Supreme Court, U.S.
FILED

031011 JAN 12 2004

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No. 03- _____

In the Supreme Court of the United States

MANATEE COUNTY,

Petitioner,

v.

PEEK-A-BOO LOUNGE OF BRADENTON, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition involves a challenge by two sexually-oriented "adult dancing establishments," as defined in Chapter 2-2.5 of the Manatee County Code (the "Adult Entertainment Code"), to Manatee County Ordinances No. 98-46 and No. 99-18. Ordinance 98-46, an amendment to the County's preexisting Adult Entertainment Code, provides interior layout requirements for adult dancing establishments. The district court, concluding that Ordinance 98-46 had "no conceivable impact on the expressive element of nude dancing," Pet. App. 64a, upheld the bulk of its provisions. The Eleventh Circuit, viewing Ordinance 98-46 in isolation from the legislative findings stated in the Adult Entertainment Code (§ 2-2.5-2), invalidated the Ordinance for lack of *pre-enactment* secondary effects evidence. Ordinance 99-18, modeled after the law upheld in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), prohibits public nudity. Based on the Ordinance's legislative record, the district court concluded that the County had "more than met its burden," Pet. App. 62a, of providing secondary effects evidence and granted the County summary judgment. The Eleventh Circuit reversed and remanded for trial.

The Questions Presented are:

1. Did the Court of Appeals err in holding Ordinance 98-46 unconstitutional for an alleged lack of a *pre-enactment* secondary effects record specific to that Ordinance?

2. Did the Court of Appeals err in reversing summary judgment in favor of the County on Ordinance No. 99-18, and in holding that now "summary judgment is inappropriate" on the grounds that plaintiffs' evidence, pertaining largely to their particular businesses, supposedly negated the legislative record upon which the Ordinance was based?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below include Manatee County, a political subdivision of the State of Florida, Peek-A-Boo Lounge of Bradenton, Inc., a Florida corporation, and M.S. Entertainment, Inc., a Florida corporation.

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PETITION FOR A WRIT OF CERTIORARI

Manatee County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is published at 337 F.3d 1251, and is included herein at Pet. App. 3a-49a. The Eleventh Circuit's Order denying rehearing appears at Pet. App. 1a-2a. The district court's summary judgment opinion, Pet. App. 52a-74a, and final summary judgment order, Pet. App. 50a-51a, are unpublished.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The appendix, at Pet. App. 75a-91a, reproduces Manatee County Ordinance No. 99-18, Ordinance No. 98-46, and the First Amendment to the United States Constitution.

JURISDICTION

The Eleventh Circuit denied petitioner's timely Petition for Rehearing and for Rehearing En Banc on October 16, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case presents two important and recurring questions concerning local regulation of sexually oriented businesses. The first is whether a regulation of the manner in which adult businesses are operated is rendered invalid *in toto* because the

government relies upon secondary effects evidence in defending the regulation, but does not build a specific legislative record concerning secondary effects *prior to* enactment of the legislation. The Eleventh Circuit held that this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), required it to invalidate the County's interior configuration requirements for strip clubs, notwithstanding the fact that another panel of the Eleventh Circuit, in a reported decision, had previously upheld nearly identical regulations. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1369 (11th Cir. 1999). Because the Eleventh Circuit's "pre-enactment" evidentiary requirement is in conflict with this Court's decisions in *Renton*, *supra*, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), as well as decisions of the Third, Fourth, Fifth, and Sixth Circuits, this Court should grant certiorari.

The second question, which involves a public nudity regulation similar to those upheld in *Barnes* and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), is also important. The question asks whether a local government, even when it relies on pre-enactment evidence "reasonably believed to be relevant to the problem that the [government] addresses," *Renton*, 475 U.S. at 51-52, is nevertheless required to go to trial over its legislative justification if the plaintiffs' experts claim that the government's legislative record is not "scientific" or that the plaintiffs' particular businesses do not cause the harms targeted by the regulation. The Eleventh Circuit held: that such testimony suffices to "cast direct doubt" on the County's legislative justification under *City of Los Angeles v. Alameda Books*, 525 U.S. 435, 438 (2002), that now "summary judgment is inappropriate" for the question of legislative justification, and that at trial, the district court must decide "by a preponderance of the available evidence" whether "there remains credible evidence upon which the County

could reasonably rely." Pet. App. 45a-46a (emphasis supplied).

In holding that the constitutionality of an ordinance will depend upon "local conditions," *id.*, the appeals court imposed an empirical proof requirement rejected in each of this Court's previous adult business cases, *see*, *e.g.*, *City of Los Angeles*, 525 U.S. at 439. In doing so, the panel transformed the question of *legislative* justification for a local ordinance from an issue of law into an issue of *adjudicative fact* that must be determined at trial instead of summary judgment. *But see Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 211 (1997) (holding that summary judgment is appropriate in First Amendment case, even when evidence concerning legislative justification is in conflict). The Eleventh Circuit's conclusions are not only contrary to this Court's precedents, but also create a conflict with decisions of the Seventh and Eighth Circuits. *G.M. Enterprises v. Town of St. Joseph*, 2003 U.S. App. LEXIS 23936, *21-23 (7th Cir. 2003) (holding that summary judgment was appropriate, notwithstanding plaintiffs' allegedly conflicting evidence); *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003) (same).

This Petition presents the Court with an opportunity to address both of these issues and resolve the confusion in the lower courts concerning judicial superintendence of legislative judgments in this area.

* * * *

On July 20, 1984, the Manatee County Board of County Commissioners passed Ordinance 84-11, known as the Adult Entertainment Code, to regulate the conduct within and the operation of sexually oriented businesses in the County. That

Ordinance, codified as Chapter 2-2.5 of the Manatee County Code, identifies several legislative findings pertinent to the County's purpose for adopting the Adult Entertainment Code, as well as the secondary effects evidence upon which those findings are based. Pet. App. 92a-95a.

1. On November 24, 1998, the Manatee County Board of County Commissioners conducted a public hearing on Ordinance 98-46, an ordinance to amend Chapter 2-2.5 to establish interior configuration requirements for adult dancing establishments. Pet. App. 34a n.15. The Ordinance tracked, almost verbatim, an ordinance from the City of Jacksonville, Florida, which had previously been upheld against constitutional attack. *Lady J. Lingerie v. City of Jacksonville*, 973 F.Supp.2d 1428, 1444-1445 (M.D. Fla. 1997) (upholding requirement of minimum room size for adult dancing establishments and noting that "Plaintiffs' own witnesses testified that masturbation took place in the modeling rooms, and was in fact anticipated by the owners that it would occur, as evidenced by their providing tissues and lotion for that purpose"). During the hearing, the Board of Commissioners discussed the Ordinance, including the fact that the Ordinance was patterned after Jacksonville's ordinance, which had recently been validated in federal court. Pet. App. 64a. At the conclusion of the hearing, the Board adopted Ordinance 98-46 as part of Chapter 2-2.5, the Adult Entertainment Code. *Id.*

Approximately four months later, on March 23, 1999, the Board of County Commissioners held a public hearing on Ordinance 99-18 - a separate regulation, not part of the Adult Entertainment Code - which prohibits nudity in public places, unless such nudity is "otherwise protected by the United States or Florida Constitution[s]." The preamble to the Ordinance expresses specific reliance upon *Barnes v. Glen*

Theatre, Inc., 501 U.S. 560 (1991), which upheld a similar regulation against constitutional attack. Pet. App. 78a.

The Board also considered a wealth of relevant evidence concerning the secondary effects of nude dancing, including a 1991 document from neighboring Pinellas County describing the illicit activities occurring in erotic dancing facilities. That document describes prostitution, sexual contact, and lewd acts occurring in adult dancing establishments just to the north of Manatee County. Pet. App. 60a. Additionally, the Board considered the secondary effects of adult businesses experienced by several other municipalities, including Phoenix, Arizona, Indianapolis, Indiana, Seattle, Washington, and four cities in Texas - Amarillo, Austin, Beaumont, and Houston. *Id.*

Respondents also submitted information to the Board at the public hearing on Ordinance 99-18. Their packet included documents which they claimed as proof that *their individual businesses* did not cause the secondary effects associated with nude dancing as demonstrated in the cases and reports before the Board. Pet. App. 60a-61a. The parties presented numerous letters in support of the Ordinance and in opposition to the Ordinance. Pet. App. 61a. At the conclusion of the hearing, the Board voted to adopt Ordinance 99-18. *Id.*

2. One month prior to the effective date of the Ordinances, Respondents filed suit in the district court pursuant to 42 U.S.C. § 1983. On the County's motion for summary judgment, the district court upheld both Ordinances. In upholding Ordinance 98-46, the district court found that the physical layout requirements have "no conceivable impact on

the expressive element of nude dancing." Pet. App. 64a.[1] The court also relied upon the Eleventh Circuit's prior determination that the interior configuration requirements serve substantial governmental interests in preventing the negative secondary effects associated with sexually explicit entertainment businesses.[2] *Id.* In reviewing Ordinance 99-18, the public nudity ordinance, the district court surveyed the extensive secondary effects reports compiled during the Board's proposal and deliberations. Pet. App. 60a. The court noted that the secondary effects information includes not only a number of reports from communities around the country, but also "a transcript of testimony by a sergeant from the Pinellas County Sheriff's Office concerning his first-hand observations of the proliferation of prostitution, sexual contact, and lewd acts that take place in nude dancing establishments in Pinellas County." *Id.*

The district court also considered Respondents' pre-enactment "counter-evidence." Pet. App. 60-61a. The court explained that:

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[1] The district court did strike a provision in Ordinance 98-46 that prohibits adult dancing establishments from having "private rooms" because the term was not defined in the Ordinance. The County did not appeal that ruling.

[2] In discussing the requirement of a substantial government interest, the district court noted that in defending a secondary effects ordinance, it is sufficient that the government presents a "'factual basis for [its] legislative judgment ... in court when that judgment is challenged.'" Pet. App. 59a n.3 (d.c. 6) (quoting *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3d Cir. 1997) (*en banc*) (rejecting pre-enactment evidentiary requirement and concluding that there is "no such rule in Renton, Mitchell, or any other governing precedent.")).

> Those documents included charts that purportedly reflect an increase in property values for property located near the Plaintiffs' businesses. *The charts provide no information concerning the identity of the sample properties or their proximity to Plaintiffs' businesses*. The documents also include crime incident lists from the Plaintiffs' businesses and surrounding areas. *The incident reports show that crimes including criminal mischief, robbery, battery and assault have taken place at the Plaintiffs' businesses and in the purportedly surrounding areas throughout 1997 and 1998.*

Pet. App. 61a (citations omitted; emphasis supplied).[3]

The district court concluded that the County had "more than met its burden" of providing a secondary effects justification and, noting this Court's decisions in *Barnes* and *Erie*, upheld Ordinance 99-18 on its face and as applied to the Respondents' sexually oriented businesses. Pet. App. 61a-62a, 67a.

3. The Eleventh Circuit reversed. The court began by surveying this Court's secondary effects cases, noting at several places in its discussion that the relevant precedents involved both time, place, and manner regulations and regulations of expressive conduct designed to further content-neutral interests. *See*, *e.g.*, Pet. App. 10a-11a. Demonstrating the interchangeable nature of the two tests, the

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[3] The district court did not specifically address the *post*-enactment reports from witnesses hired by Respondents. Thus, judicial findings concerning these reports were made, in the first instance, by the court of appeals.

court held that "[i]n deciding whether a given ordinance 'is designed to serve' (*Renton*) or 'furthers' (*O'Brien*) the government's alleged interest in combating the negative secondary effects associated with adult entertainment, the standard we apply is the one described in Renton and utilized in *Barnes*, *Pap's A.M.*, and *Alameda Books*." Pet. App. 29a.

At the conclusion of its survey of the relevant cases, however, the court of appeals inexplicably failed to follow this Court's precedents and applied different tests to the County's two Ordinances regulating nude conduct. Pet. App. 30a.[4] Turning first to Ordinance 98-46, the panel characterized this amendment to the County's Adult Entertainment Code (a licensing law) as a "zoning ordinance" and held that, as such, the Ordinance was subject to the analysis set forth "in *Renton* and *Alameda Books*." Pet. App. 31a. Noting that *Renton* requires only that "whatever evidence the [local government] *relies* upon is reasonably believed to be relevant to the problem the [government] addresses," the panel nevertheless concluded that such reliance, if made only when a regulation is challenged, is

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[4] Specifically, the panel's analysis of Ordinance 98-46, which imposed manner regulations on nude dancing facilities, completely ignored *Barnes* and *Erie* – the seminal nude dancing cases. These cases are critical to the "pre-enactment evidence" issue, because in *Barnes*, this Court upheld a nude conduct regulation, as applied to adult businesses, in the absence of any legislative record at all. 501 U.S. at 568 (1991) (Souter, J., concurring in judgment) (noting that "Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose"). Similarly, in *Erie*, this Court upheld a prohibition on public nudity based on the city's legislative findings (without extrinsic evidence) and then noted that the city's reliance on prior judicial decisions describing secondary effects was also sound. 529 U.S. at 296-297.

constitutionally insufficient. Pet. App. 32a. Further, the panel rejected the County's pre-enactment reliance on the district court decision in *Lady J. Lingerie*. Pet. App. 34a.

Finally, the lower court recognized contrary circuit authority, but concluded that upholding a regulation based solely upon post-enactment secondary effects evidence "is difficult to square with *Renton*." Pet. App. 35a-36a. Noticeably absent from the lower court's analysis, however, is any discussion of *Barnes*, where - in the absence of *any* legislative record - the Court applied *Renton* and upheld a content-neutral regulation as applied to nude dancing establishments. 501 U.S. 568 (Souter, J., concurring in judgment).

In addressing Ordinance 99-18, the panel began by invoking this Court's decision in *City of Erie*, which applied the analysis first enunciated in *O'Brien* and later developed in *Renton* and *Barnes*. The court concluded that "Ordinance 99-18 easily satisfies the first and third prongs of *O'Brien*" because the regulation is within the County's police powers and because "[t]he Supreme Court has repeatedly held this type of general ban to be unrelated to the suppression of free expression." Pet. App. 38a.

The court of appeals then discussed the evidence from the Pinellas County Sheriff's Department and the Pinellas County Health Department documenting "the proliferation of prostitution, sexual contact and lewd acts that take place in nude dancing establishments" as well as the communicable diseases that are transmitted by the unprotected sexual activity taking place in those establishments. Pet. App. 39a. Based on these documents - without reference to the myriad of other studies in the County's legislative record - the panel held that

the County's legislative justifications "satisfy the County's pre-enactment burden as set forth in *Renton*." Pet. App. 40a.

Next, the Eleventh Circuit held that Respondents had "cast direct doubt" on the County's secondary effects rationale - a rationale upheld by this Court in both *Barnes* and *Erie* - by introducing: (a) affidavits from their witnesses that the reports in the County's legislative record lacked "appropriate research methodology," *id.*; *see also* Pet. App. 42a n.20, and (b) reports claiming that *Respondents' individual businesses* did not cause secondary effects. Pet. App. 40a-42a. Interestingly, the panel did not disagree with the district court's conclusion that the Manatee County Sheriff's Office incident reports "show that crimes including criminal mischief, robbery, battery and assault have taken place *at the Plaintiffs' businesses* and in the purportedly surrounding areas throughout 1997 and 1998." Pet. App. 61a (emphasis supplied).

Rather, the panel apparently accepted Respondents' comparative-analysis theory of secondary effects, which holds that secondary effects can be said to exist only when the problems of adult businesses are *worse*, by comparison, than the problems associated with non-adult businesses. In this vein, the panel required empirical proof of secondary effects, reiterating that "the constitutionality of an ordinance will depend on local conditions." Pet. App. 45a (quoting *Flanigan's Enterprises, Inc., v. Fulton County, Ga.*, 242 F.3d 976, 987 (11th Cir. 2001)). Because of this, the panel considered it "significant" that the County had not conducted "local studies of its own" or hired "competing experts" to defend the legislative justification for its *Barnes*-type nudity regulation. Pet. App. 44a. The court of appeals concluded that it could not "credit the County with complying with Renton's narrow tailoring requirement, which requires that a

secondary effects ordinance be drawn to affect only that category of business 'shown to produce the unwanted secondary effects,'" Pet. App. 44a-45a, suggesting that the relevant "category" for purposes of *Renton*, is not the class of "adult businesses" or even the sub-class of "adult dancing establishments," but rather the two adult dancing establishments in Manatee County. Pet. App. 45a (citing *Flanigan's*, *supra*, for the proposition that "local conditions" control the constitutionality of adult business ordinances) (clarification supplied).

In sum, the court of appeals removed the secondary effects question from the realm of law and placed it into the realm of triable fact. Pet. App. 45a. Although noting that the County's ordinance might still survive intermediate scrutiny, the Court reasoned that "under Alameda Books, at this point summary judgment is inappropriate" and the legislative justification for the County's Ordinance must be adjudicated as a question of fact at a trial. *Id.* (citations omitted).

4. After the Eleventh Circuit denied rehearing and rehearing *en banc*, Pet. App. 1a-2a, this Petition followed.

REASONS FOR GRANTING THE WRIT

The important grounds for granting certiorari to review the Eleventh Circuit's judgment in this case are straightforward. The circuits are split over each of the questions presented: (1) whether *pre-enactment* evidence of secondary effects is required to sustain a secondary effects ordinance, and (2) whether a challenge to a local government's secondary effects evidence transforms the question of legislative justification from a matter of law into an issue of triable fact.

I. The Eleventh Circuit's "Pre-enactment" Secondary Effects Requirement Conflicts With the Law of Several Circuits and of This Court.

The panel below recognized that requiring a "pre-enactment" secondary effects record - and precluding the County from defending its ordinance in court without one - is at odds with the Third Circuit's *en banc* decision in *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3d Cir. 1997) (en banc) (holding that it is sufficient that the government demonstrate a "factual basis for [its] legislative judgment ... in court when that judgment is challenged").

The panel, however, failed to recognize that requiring pre-enactment legislative evidence is also completely contrary to *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), where the controlling opinion stated that the "appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current* governmental interest in the service of which the challenged application of the statute may be constitutional." *Id.* at 582 (Souter, J., concurring in judgment). Thus, in footnote 16 of its opinion, the panel relied upon several pre-*Barnes* circuit decisions that imposed pre-enactment legislative evidence requirements for adult business regulations.

In doing so, the panel ignored several post-*Barnes* decisions in those same circuits that supersede the earlier decisions. For example, the panel cites *Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) for support of its pre-enactment evidence requirement, but this portion of *Christy* was expressly overruled when the Sixth Circuit followed *Barnes* in *DLS, Inc. v. City of Chattanooga*. 107 F.3d 403, 411 (6th Cir. 1997) ("[The plaintiffs] cite Sixth Circuit authority to the effect that the government must show

that the legislature actually relied on evidence of secondary effects. This argument, however, is foreclosed by Justice Souter's concurrence in *Barnes*") (citations omitted). The Fourth, Fifth, Seventh, and Ninth Circuits have also followed *Barnes* on this point in subsequent cases. *See, e.g., Chesapeake B & M v. Harford County*, 58 F.3d 1005, 1012 n. 8 (4th Cir. 1995); *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998); *BGHA, LLC v. City of Universal City*, 340 U.S. 295, 299 (5th Cir. 2003); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 830 (7th Cir. 1999); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1166 n.3 (9th Cir. 2003) (following Seventh Circuit and Third Circuit and noting that "a record could be established in the court after legislation is passed and challenged") (quoting *Ben Rich Trading Co. v. City of Vineland*, 126 F.3d 155, 161 (3d Cir. 1997)).

Thus, while the Second, Tenth, and Eleventh Circuits[5] hold that a lack of pre-enactment secondary effects evidence is fatal to an ordinance, the Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits hold that pre-enactment evidence is not required so long as the local government justifies its ordinance when it is challenged in court.

There is no logical way to reconcile the split of authority among the circuits. While the Eleventh Circuit attempted to

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[5] The positions of the First Circuit and the Eighth Circuit are less clear. The cases cited by the panel below do not squarely present the pre-enactment record requirement, but rather conclude, in a descriptive (rather than prescriptive) sense that the municipalities in question had pre-enactment evidence that satisfied *Renton*. *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 57-58 (1st Cir. 1999); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 (8th Cir. 2003).

distinguish *Renton's* time, place, and manner standard from *Barnes'* application of the *O'Brien* test (by characterizing Ordinance No. 98-46 as a "zoning ordinance" subject to *Renton*, without the gloss of *Barnes* and *Erie*), such a distinction is completely insupportable. As this Court has recognized, *O'Brien* analysis is essentially indistinguishable from time, place, or manner analysis. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Perhaps nowhere is the interchangeable nature of the two lines of analysis more evident than in this Court's adult business cases, which, as the panel recognized, employ the substantial government interest standard "described in *Renton* and utilized in *Barnes*, *Pap's A.M.*, and *Alameda Books*." Pet. App. 29a; *see Heideman v. South Salt Lake City*, 348 F.3d 1182, *26-30 (10th Cir. 2003) (explaining the extent of integration of the *O'Brien* and *Ward* lines of cases).

Moreover, the panel's distinction - between "adult business" regulations and generally-applicable nudity regulations (i.e., *Barnes* and *Erie*) - does not solve the circuit split, given that nearly all of the circuit decisions rejecting the pre-enactment evidence requirement involve, as Ordinance 98-46 does here, time, place, and manner "regulations [that] apply only to those businesses purveying a form of sexually explicit speech." Pet. App. 31a. *See, e.g., DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (involving stage requirements for adult dancing establishments); *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) (*en banc*) (zoning ordinance for adult uses); *BGHA, LLC v. Universal City, City of Universal City*, 340 U.S. 295 (5th Cir. 2003) (same); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999) (hours of operation for adult businesses); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) (same).

The circuit conflict is also important, as the view espoused below and in a plurality of circuits precludes local governments from producing evidence in support of regulations which protect public health and safety if specific evidence was not before the legislative body prior to enactment. One need look no further than the panel's decision in this case to observe the perverse results such a rule would produce. The federal court for the County's district had previously upheld interior configuration requirements like those contained in Ordinance 98-46, finding that the minimum room size requirement "allow[s] Plaintiffs the opportunity to express their erotic message - nude dancing - to a potentially larger audience without the additional risk of promoting the unwanted effects of public masturbation and prostitution that individual performances in a private room encourage." *Lady J. Lingerie v. City of Jacksonville*, 973 F.Supp.2d 1428, 1445 (M.D. Fla. 1997), aff'd 176 F.3d 1358, 1369 (11th Cir. 1999).

Manatee County's identical regulation, however, was invalidated for an alleged lack of pre-enactment evidence - even though it undoubtedly serves the same government interest that the City of Jacksonville's regulation serves. Although the County may remain free to reenact the same regulations with a more complete pre-enactment legislative record, such a circular exercise would add nothing to the fact that interior layout requirements serve the County's substantial interests in preventing illicit activities in adult dancing establishments. Instead, requiring such an exercise would run headlong into this Court's oft-repeated statement that "'we decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.'" *Barnes*, 501 U.S. at 583 (Souter, J.,

concurring in result) (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

II. The Eleventh Circuit's Holding that Legislative Justification for a Public Nudity Ordinance is a Question of Fact that Must Be Resolved at Trial Based on Local Conditions, Under a "Preponderance of Evidence" Standard, Conflicts with Decisions of the Seventh and Eighth Circuits and This Court.

In applying *Alameda Books*, at least two circuits have concluded, contrary to the panel's decision, that evidentiary challenges on the grounds advanced below do not preclude summary judgment in favor of a municipality's secondary effects record. *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 2003 U.S. App. LEXIS 23936 (7th Cir. 2003). This irreconcilable split of authority warrants this Court's intervention because the Eleventh Circuit's position transforms a question of law - the constitutionality of a municipal ordinance - into a question of fact that changes from city to city based on "local conditions." The Eleventh Circuit's level of judicial superintendence over local decision-making is, as the Court stated in a case involving more important First Amendment concerns, "as unreasonable in the legislative context as it is constitutionally unwarranted." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 213 (1997).

In contrast to the Eleventh Circuit's holding in this case, the other circuits to address the issue at bar have properly adhered to this Court's *Renton* standard in adjudicating similar ordinances. In *SOB, Inc.*, the "primary issue" was "whether Benton County, Minnesota, violated the First Amendment by enacting an ordinance prohibiting live nude

dancing entertainment when there was evidence presented to the County Commissioners suggesting that existing adult entertainment establishments had not adversely affected nearby property values or crime rates." 317 F.3d at 858-59. In that case, as in this one, the County Commissioners relied upon: (1) "studies by other municipalities," and (2) "other evidence of the adverse secondary effects associated with adult entertainment businesses." *Id.* at 862. Similarly, the plaintiffs in that case - as in this one - challenged the public nudity ordinance on two grounds: (1) that the "methodologies of the secondary effects studies" were unscientific, *id.* (citing journal article criticizing the studies), and (2) that their particular business "had neither caused higher crime rates nor depressed the value of nearby properties in the time they had been operating." *Id.*

Rejecting the proposition that the plaintiffs had "cast sufficient doubt" upon the legislative rationale, the Eighth Circuit pointed to evidence of prostitution and illicit sexual activity in the County's legislative record and noted that the plaintiffs' countervailing evidence did not address these secondary effects, which are common-place in adult businesses. *Id.* at 863. "Moreover," the court noted, "zoning restrictions typically impact a broad range of adult entertainment businesses, whereas a ban on live nude dancing imposes a *de minimis* restriction on expressive conduct, while otherwise 'leaving the quantity and accessibility of speech substantially intact.' *Alameda Books*, 122 S. Ct. at 1742 (Kennedy, J., concurring)." *Id.* Thus, in the Eighth Circuit's view, such regulations are constitutional under the First Amendment and are appropriate for summary disposition. *Id.*

The Seventh Circuit is in accord. In *G.M. Enterprises, Inc. v. Town of St. Joseph*, 2003 U.S. App. LEXIS 23936 (7th Cir. 2003), the court examined a regulation prohibiting

nude dancers from performing within 5 feet of customers and a prohibition on nudity in alcohol-licensed establishments. In challenging the municipality's secondary effects record, which included numerous studies from other jurisdictions, the plaintiff submitted: (1) the same journal article submitted in *SOB, Inc.*, challenging "the methodology employed in the numerous studies,"[6] (2) "evidence of an increase of property values near the Club," and (3) "evidence that the majority of police calls in regards to the Club originated during periods of time when no semi-nude dancing occurred." *Id.* at *20.

In affirming summary judgment for the municipality, the Seventh Circuit explained that while *Alameda Books* makes it clear that deference to the legislative rationale is not unbounded, it "does not require a court to re-weigh" a municipality's legislative evidence. *Id.* Moreover, even when contrary evidence "shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process." *Id.*

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[6] *See* Bryant Paul, Daniel Linz, and Bradley Shafer, Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 COMM. L. & POL. 355 (2001). The article is authored by an adult business attorney and two professors who regularly testify for adult businesses. More important, however, is the fact that the article is identical in substance to the "study" submitted by the same authors as an appendix to an amicus brief in the *Erie* case. Discussing the report, the plurality opinion stated that "the study relied on by *amicus curiae* does not cast any legitimate doubt" on the Erie city council's legislative judgment. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23." 529 U.S. at 298.

Finally, the court rejected the plaintiff's argument that a municipality cannot establish a reasonable belief in its secondary effects rationale, as required by *Alameda Books* and *Renton*, unless the studies it relies upon meet a standard of "methodological rigor." *Id.* at *21-22. This argument, the Seventh Circuit concluded, "is completely unfounded" under *Renton*, especially in light of the fact that *Alameda Books* "bluntly rejected" the dissent's "suggestion that the municipality be required to present empirical data to support" its secondary effects rationale. *Id.* at *22.

In contrast to these decisions, the Eleventh Circuit both accepted Respondents' "methodological rigor" challenge to the County's secondary effects evidence and held that the County's public nudity regulation must be justified by "local conditions" (i.e., empirical data from the County). Pet. App. 42a n.20, 44a-45a.

The division of authority among the circuits cannot be resolved absent this Court's intervention. Moreover, the question presented is important, not only because the lower court's decision violates established precedents from this Court, but also because it works a sea change in this area of law by transforming a question of law into a question of triable fact for which "summary judgment is inappropriate." Pet App. 45a.

Of course, *Alameda Books* did not hold that conflicting secondary effects evidence precludes disposition of the issue on summary judgment. The term "trial" was mentioned only once in the case, in dictum contained in the penultimate sentence of Justice Kennedy's concurring opinion. 525 U.S. at 453. This passing mention of the term does not signal a transformation in this area of law such that the legal justification for a legislative enactment has now become a

factual issue that must be settled at a trial concerning the wisdom of the legislature's judgment.

Indeed, in a case much closer to the core of the First Amendment, Justice Kennedy's opinion for the Court held that summary judgment is proper even when conflicting evidence challenges a legislative justification under *O'Brien*. *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180 (1997) (upholding "must-carry" regulations forcing "cable television systems to dedicate some of their channels to local broadcast television stations"). This conclusion follows, *a fortiori*, for regulations of public nude conduct "marginally" protected at the outer ambit of the First Amendment. *See City of Erie*, 529 U.S. at 297 (holding that "[b]ecause the nude dancing at Kandyland is *of the same character* as the adult entertainment at issue" in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *California v. LaRue*, 409 U.S. 109 (1972), "it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects").

Specifically, the *Turner* court held that in deciding whether substantial evidence - either anecdotal or empirical - supports the legislative justification, the role of the judiciary is limited:

> In making that determination, we are not to "re-weigh the evidence *de novo*, or to replace Congress' factual predictions with our own." Id. at 666. Rather, we are simply to determine if the standard is satisfied. If it is, summary judgment for defendants-appellees is appropriate regardless of whether the evidence is in conflict. We have noted in another context, involving less deferential review than is at issue here, that "'the possibility of drawing two inconsistent conclusions

> from the evidence does not prevent ... [a] finding from being supported by substantial evidence.'"

520 U.S. at 211 (citations omitted).

Here, the panel held that the district court must conduct a trial and determine, "by a preponderance of the available evidence," Pet. App. 46a, the reasonableness of the legislative judgment "in light of" the panel's determination that Respondents "cast direct doubt" upon the County's legislative record with their "methodological rigor" and "local conditions" arguments. Pet. App. 45a. However, Respondents did not challenge "in any fundamental way" the veracity of the facts in the County's legislative record documents, but rather "only their significance." *Turner*, 520 U.S. at 214. In light of the County's extensive evidence concerning the harms of adult businesses in general, and nude dancing establishments in particular, the court of appeals' erred in rejecting the reasonable inferences that the Board of County Commissioners drew from the legislative record. *Id.* at 211.

In *Renton*, this Court recognized the longstanding limitations on judicial intervention with legislative judgments and established a straightforward test for secondary effects ordinances:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

This straightforward statement dispenses with both of the requirements imposed by the court of appeals. First, as this Court has repeatedly held, the constitutionality of regulations concerning the manner in which expression occurs is not determined by "local conditions," but that such regulations "must be evaluated in terms of their *general* effect." *United States v. Albertini*, 472 U.S. 675, 688-89 (1985) (emphasis added); *id.* at 688 (explaining that "the First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception *in the particular case* will not threaten important government interests") (emphasis added) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984)).

Second, a local legislative body is not required to "scientifically" or conclusively prove its legislative justification through a rigorous, comparative analysis between adult and non-adult businesses, *City of Erie*, 529 U.S. at 298, but rather can rely upon *any* evidence "reasonably believed to be relevant to the problem the [local government] addresses." *Renton*, 475 U.S. at 51-52. Here, for example, the panel below did not question the veracity of either the County's evidence pertaining to prostitution and lewd conduct in adult dancing establishments or the facts underlying the numerous secondary effects studies in the County's legislative record.

Nevertheless, the panel accepted Respondents' broad-stroke arguments that the "only set of *empirical* studies relied upon by the County" lacked "appropriate research methodology" and that *Respondents' particular businesses* do not cause the secondary effects associated with nude entertainment venues. Pet. App. 42a n.20 (emphasis supplied). As discussed above, however, nothing in this Court's opinions requires empirical proof for the County's

legislative rationale, let alone empirical proof compiled with the comparative-analysis "research methodology" proposed by plaintiffs' witnesses. Nor is the constitutionality of a time, place, or manner regulation determined by the current "local conditions" associated with Respondents' particular businesses. Indeed, the court of appeals' reading of *Alameda Books* in the context of the County's public nudity prohibition not only eviscerates the precedential value of *Barnes* and *Erie*, but also thoroughly undermines the straightforward *Renton* standard upon which hundreds of local governments have relied in enacting ordinances. Moreover, the Eleventh Circuit's holding that "summary judgment is inappropriate" and that a trial is required to test the County's legislative justification conflates dicta in *Alameda Books* with *Renton's* holding that the constitutionality of a local government's secondary effects rationale is determined as a matter of law. 475 U.S. at 51-52.

CONCLUSION

Because the court of appeals' holding is in conflict with the decisions of other circuits, imposes an improper burden on local governments, and is constitutionally unwarranted, this Court should grant the Petition for a Writ of Certiorari.

January 12, 2004

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.: 02-12281-JJ
[Filed Oct. 16, 2003]

PEEK-A-BOO LOUNGE OF BRADENTON, INC., a Florida corporation, M.S. ENTERTAINMENT, INC., a Florida corporation,
Plaintiffs-Appellants,

versus

MANATEE COUNTY, FLORIDA, a political subdivision of the State of Florida,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in

regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12281

[Filed July 15, 2003]

PEEK-A-BOO LOUNGE OF BRADENTON, INC., a Florida corporation, M. S. ENTERTAINMENT, INC., a Florida corporation,
Plaintiffs-Appellants,

v.

MANATEE COUNTY, FLORIDA, a political subdivision of the State of Florida,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D. C. Docket No. 99-02707-CV-T-25-C
James D. Whittmore, Judge

Before EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

OPINION

BARKETT, Circuit Judge:

Peek-A-Boo Lounge of Bradenton, Inc. and M.S. Entertainment, Inc. d/b/a Temptations II ("the Adult Lounges"), two adult dancing establishments, appeal the District Court's grant of summary judgment to Manatee County, Florida ("the County"), upholding the constitutionality of two County ordinances that regulate adult dancing establishments and public nudity. The Adult Lounges argue that Ordinance 98-46, which imposes requirements on the physical layout of adult dancing establishments and allows the County Sheriff to search such premises without a warrant, and Ordinance 99-18, a general public nudity statute, violate their First, Fourth, Fifth, and Fourteenth Amendment rights. In addition, the Adult Lounges contend that both ordinances impair their previously approved settlement agreement with the County and thus violate the Contract Clause, U.S. Const. Art. I, § 10, cl. 1. Finally, the Adult Lounges maintain that Ordinance 99-18 is both preempted by, and inconsistent with, Florida state law.

I. BACKGROUND

In 1987, Manatee County adopted Ordinance 87-07, an "Adult Entertainment Code," which made the locations of Appellants' existing businesses, the County's only two licensed adult dancing facilities, nonconforming. Appellants filed suit in federal court challenging the constitutionality of the ordinance. The parties settled the lawsuit on April 11, 1989, with an agreement that allowed the Adult Lounges to continue to provide adult entertainment. The settlement

effectuated a permanent injunction that enjoined the County from enforcing Ordinance 87-07 against the Adult Lounges for the current use of their properties.

Almost ten years later, on November 24, 1998, the Manatee County Board of County Commissioners ("the Board") enacted a similar ordinance, Ordinance 98-46, which amended the County's Adult Entertainment Code, Chapter 2-2.5-59 of the Manatee County Code of Laws, by providing specific physical requirements for premises used as adult dancing establishments, and which again made Appellants' businesses nonconforming.[1]

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[1] Ordinance 98-46 amended § 2-2.5-59 of the Manatee Code by adding the following provisions (g) through (o).

> (g) All adult dancing establishment premises shall have an entrance room or lobby, i.e., the room which is entered from the outside, and sanitary facilities as set forth in subsection 2-2.5-56(f). The entrance room or lobby may be as large or small as the licensee chooses.
>
> (h) All other rooms in adult dance establishment premises must either:
>
> (1) be not less than one thousand square feet in area; or
>
> (2) be clearly marked in letters not less than two inches in height "No Customers or Patrons Allowed."
>
> (i) Except for sanitary facilities, no doorway or entranceway within any premises shall be locked at any time a customer is anywhere within the premises or at anytime the premises are open to the public unless customers or patrons are prohibited at all times from going into the rooms or areas behind such doorways or entranceways and provided such doors are marked as set forth in paragraph (h)(2) above.
>
> (j) At least one doorway into or out of the adult dancing establishment premises shall be unlocked at anytime a customer is anywhere within an adult dancing

Four months later, Manatee County adopted "Public Nudity Ordinance" 99-18, which made it unlawful "to knowingly, intentionally, or recklessly appear, or cause another Person to appear, Nude in a Public Place." Although Ordinance 99-18 was not exclusively directed toward adult entertainment establishments, its stated aim was, inter alia, to prevent "incidents of prostitution, sexual assaults and batteries, [and] other criminal activity" that the County found to be associated with "the mere appearance of nude persons in public places." The ordinance identified "public places" to include "streets, sidewalks, parks, beaches, [and] business and commercial establishments." Ordinance 99-18 also

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establishment premises or at anytime the premises are open to the public.

(k) All rooms open to the public in any adult dancing establishment premises shall be lighted such that the light intensity at every point thirty inches above the floor is not less than one-half footcandle.

(l) The Sheriff shall have access to all rooms at all times any adult dancing establishment premises are open to the public. Premises are irrebuttably presumed to be open at any time a customer is on the premises. This access shall be for inspection purposes only.

(m) No room other than a sanitary facility or room marked as set forth in (h)(2) shall have any dividers or partitions or any other thing in excess of three feet in height which blocks the view of any portion of the room.

(n) Private rooms are prohibited within the adult dancing establishment premises.

(o) No room within the premises shall have its doorway or threshold blocked or obscured by doors, curtains, drapes or any other obstruction unless the room is (1) a sanitary facility, (2) the room is an adult motion picture theater in which movies are shown on a screen, or (3) a room marked as set forth in paragraph (h)(2), hereinabove.

defined "nudity" broadly, to include the wearing of any opaque swimsuit or lingerie covering less than one-third of the buttocks or one-fourth of the female breast.[2] Further, the

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[2] Ordinance 99-18 defined "Nude" to refer to any person "five years of age or older" who is:

> "insufficiently clothed in any manner so that any of the following body parts are not entirely covered with a fully opaque covering: (1) The male or female genitals, . . . (2) The male or female pubic area, . . . (3) The female Breast . . . or (4) The Buttocks."

The ordinance also contained unusually elaborate definitions of "Breast" and "Buttocks."

Ordinance 99-18 defined "Breast" as:

> "A portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple) and an outside area of such gland wherein such outside area is (i) reasonably compact and contiguous to the areola and (ii) contains at least the nipple and the areola and 1/4 of the outside surface area of such gland."

The ordinance allowed that "[e]ach female Person may determine which 1/4 or her Breast surface area . . . contiguous and containing the nipple and areola is to be covered." Ordinance 99-18 defined "Buttocks" as:

> "The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top such line being 1/2 inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom such line being 1/2 inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight lines, one on each side of the body (the 'outside lines'), which outside lines are perpendicular to the ground

ordinance specifically prohibited erotic dancers and others from appearing in public wearing "G-strings, T-backs, dental floss, and thongs."

In passing Ordinance 99-18, the Board rejected the recommendation by the Manatee County Public Planning Commission that the ordinance "shall not apply to duly licensed adult entertainment establishments" like the Adult Lounges. However, in order to address possible overbreadth and other constitutional problems, the Board acknowledged in the ordinance's preamble that "there may be instances where appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression

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> and to the horizontal lines described about and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the outer side of each leg. Notwithstanding the above, Buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fasciae latae muscle or any of the above-described portion of the human body that is between either (i) the left inside perpendicular line and the left outside perpendicular line or (ii) the right inside perpendicular line and right outside perpendicular line. For the purpose of the previous sentence, the left inside perpendicular line shall be an imaginary straight line on the left side of the anus (i) that is perpendicular to the ground and to the horizontal lines described about and (ii) that is 1/3 of the distance from the anus to the left outside line, and the right inside perpendicular line shall be an imaginary straight line on the right side of the anus (i) that is perpendicular to the ground and to the horizontal lines described above and (ii) that is 1/3 of the distance from the anus to the right outside line."

The ordinance summarized this definition by stating: "The above description can generally be described as covering 1/3 of the buttocks centered over the cleavage for the length of the cleavage."

that is protected by United States or Florida constitutional provisions." The ordinance also exempted from its coverage any "bona fide live communication, demonstration, or performance . . . [that] is not a guise or pretense utilized to exploit nudity for profit or commercial gain."

One month before the two ordinances were to take effect, the Adult Lounges filed a complaint in the United States District Court, Middle District of Florida, pursuant to 42 U.S.C. § 1983,[3] alleging that the ordinances were unconstitutional. Specifically, the Adult Lounges argued that both ordinances were overbroad, were adopted on the basis of an improper predicate, failed to advance any legitimate governmental interest, constituted an invalid taking, and impaired the County's contractual obligations under the 1989 settlement; that Ordinance 99-18 was unconstitutionally vague; and that Ordinance 98-46 violated both the Fourth Amendment's prohibition of warrantless searches and the Fourteenth Amendment's guarantee of equal protection. The Adult Lounges also included claims for several alleged violations of Florida law.

On January 11, 2001, having submitted to the District Court a record of the evidence it relied on when enacting the ordinances, the County moved for summary judgment. The Adult Lounges opposed this motion and submitted affidavits

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[3] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

and expert studies contesting the County's findings concerning the negative effects caused by its businesses on the surrounding community. The District Court granted the County's motion for summary judgment, and this appeal followed.

II. STANDARD OF REVIEW

We review the District Court's grant of final summary judgment *de novo*, viewing the record and drawing all reasonable inferences in the light most favorable to the non-moving party. *See Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296 (11th Cir. 2002). The constitutionality of a statute is a question of law subject to de novo review. *See, e.g., Williams v. Pryor,* 229 F.3d 1331, 1334 (11th Cir. 2000); *United States v. Harden,* 37 F.3d 595, 602 (11th Cir. 1994).

III. DISCUSSION

A. Summary of Supreme Court's "Secondary Effects" Jurisprudence

This case involves two ordinances, a zoning ordinance and a general public nudity ordinance, both of which are alleged to violate Appellants' First Amendment rights to freedom of expression. To guide our analysis, we begin with a comprehensive summary of the Supreme Court's jurisprudence in this area. The discussion is extensive, in part because of the large number of no-clear-majority decisions of the Court in cases of this type. Moreover, our task is complicated because although the Court has formulated distinct standards for evaluating the two kinds of regulation enacted by the County in this case-zoning ordinances and public nudity ordinances- the Court also has sometimes collapsed the two categories into a single, overarching

category of regulatory action targeting the negative "secondary effects" of non-obscene adult entertainment and drawn conclusions about this single category. *See generally City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265, (2000); *Barnes v. Glen Theatre,* 501 U.S. 560, 111 S. Ct. 2456 (1991), 115 L. Ed. 2d 504; *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). Additionally, the Court has occasionally borrowed specific doctrines developed in one category of case to apply to the other. *See, e.g., Alameda Books,* 122 S. Ct. at 1736 (plurality opinion) (relying on the Court's holding in *Pap's A.M.*, a case involving a public nudity ordinance, to explicate the evidentiary showing necessary to sustain an adult entertainment zoning ordinance); *Barnes,* 501 U.S. at 583-84 (Souter, J., concurring) (relying on the evidentiary standard described in *Renton*, a zoning case, to explicate the evidentiary showing necessary to sustain a public nudity ordinance). After identifying the applicable standards, we apply them to each of the ordinances at issue in this case.

1. *California v. LaRue* and *Doran v. Salem Inn*

The Supreme Court first recognized the existence of First Amendment freedom of expression rights in the adult entertainment context in *California v. LaRue,* 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972). In that case, the Court upheld the constitutionality of state-wide licensing regulations enacted by the California Department of Alcoholic Beverage Control that prohibited sexually explicit live entertainment in establishments licensed to sell liquor. The Court held that California had broad latitude under the Twenty-first Amendment to control the manner and

circumstances under which liquor may be sold.[4] The Court acknowledged that "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression." *LaRue,* 409 U.S. at 118. However, the Court emphasized that "the critical fact is that California has not forbidden these performances across the board" but "merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.*

However, in *Doran v. Salem Inn,* 422 U.S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1974), the Court affirmed the grant of a preliminary injunction against the enforcement of a town ordinance which proscribed topless dancing in bars as well as prohibiting "any female from appearing in 'any public place' with uncovered breasts." *Doran,* 422 U.S. at 933.[5] The Court declared that "although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized [in *LaRue*] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances." *Id.* at 932. The Court held that, unlike the regulations at issue in *LaRue*,

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[4] The Twenty-first Amendment provides in pertinent part that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

[5] *Doran* does not clearly state whether the town ordinance was a zoning ordinance or a nudity ordinance. The ordinance is described as "Local Law No. 1-1973, an ordinance making it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered or so thinly draped as to appear unconvered." 422 U.S. at 924.

the ordinance in *Doran* was overbroad because it applied to all commercial establishments, not only those selling liquor by the drink, and thus was not justifiable under the Twenty-first Amendment.[6]

2. *Young v. American Mini-Theatres*

In *Young v. American Mini Theatres,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), the Court recognized for the first time that regulations of adult entertainment could be justified with reference to its negative effects on the surrounding community. The Court upheld portions of a Detroit "Anti-Skid Row" zoning ordinance that required adult movie theaters and bookstores to be dispersed throughout limited portions of the city but did not ban them entirely.[7] However, although a majority of the Court agreed that the zoning ordinance was constitutional, no single rationale for the decision enjoyed the assent of five Justices.

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[6] In *44 Liquormart, Inc., v. Rhode Island,* 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996), which invalidated Rhode Island's ban on advertisements of retail liquor prices, the Court reaffirmed the holding of *LaRue* but disavowed its reasoning insofar as it relied on the Twenty-first Amendment. The Court concluded that "*LaRue* would have [had] precisely the same result if it had placed no reliance on the Twenty-First Amendment" because "[e]ntirely apart from the Twenty-First Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* at 516. The Court did not, however, explain the effect of its holding in *44 Liquormart* on *Doran.*

[7] The ordinance prohibited the operation of any adult entertainment movie theater within 1000 feet of any two other "regulated" uses (such as adult bookstores, bars, hotels, and cabarets), or within 500 feet of a residential area. *Young,* 427 U.S. at 52.

The plurality opinion, written by Justice Stevens, held that the sexually explicit expression being regulated by the ordinance, though not altogether unprotected, was of lower value than core, political speech. *See Young,* 427 U.S. at 70 (plurality opinion) (characterizing "society's interest in protecting this type of expression" as "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."). The plurality concluded that the zoning ordinance constituted "nothing more than a limitation on the place where adult films may be exhibited" that was justified by the city's interest in "preserving the character of its neighborhoods." *Id.* at 71.

Justice Powell, who provided the fifth vote necessary to sustain the ordinance, rejected the plurality's view "that nonobscene, erotic materials may be treated differently under [the] First Amendment." *Id.* at 73 n. 1 (Powell, J., concurring). Unlike the plurality, Justice Powell analyzed the constitutionality of the zoning ordinance under the four-part test outlined in *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). *O'Brien* was not an adult entertainment case but involved a Vietnam-era war protester who claimed that the act of burning a draft card was constitutionally protected expression. Rejecting his claim, the O'Brien Court held that government regulation of expressive conduct is sufficiently justified if (1) it is "within the constitutional power of the Government"; (2) "it furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 376-377. Applying this test to the Detroit zoning ordinance, Justice Powell found that the ordinance was justified because (1) "the ordinance was within the power of the Detroit Common Council to enact"; (2) "the

interests furthered by this ordinance are both important and substantial," since "[w]ithout stable neighborhoods . . . large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values"; (3) "Detroit has not embarked on an effort to suppress free expression"; and (4) based on the evidence presented to the council, "the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose of the ordinance." *Young,* 427 U.S. at 80-82.

Unlike the four dissenters, who found the Detroit zoning ordinance to be content-based, and thus discerned in the Court's holding a "drastic departure from established principles of First Amendment law," *id.* at 84 (Stewart, J., dissenting), Justice Stevens and Justice Powell agreed that the ordinance was unrelated to the suppression of expression. Although they evaluated the ordinance under different standards, Justices Stevens and Powell also agreed that the ordinance was justified in part by the city's interest in protecting its neighborhoods against certain negative effects associated with adult entertainment. *See* 427 U.S. at 71, n. 34 (plurality opinion) (noting that the city enacted the ordinance because "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime," adding "it is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech."); *id.* at 83, n. 6 (Powell, J., concurring) ("We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings."). In *Young*, therefore, a majority of Justices endorsed, for the first time, the notion that zoning ordinances impacting sexually explicit adult entertainment could be justified with reference to its unwanted "secondary effects"

3. *Schad v. Mount Ephraim*

This concept was not without limits, however, as the Court's next encounter with adult entertainment, *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), made clear. *Schad* involved a challenge to a zoning ordinance brought by the operators of a store selling adult materials who added a coin-operated mechanism enabling customers to watch a live, nude dancer performing behind a glass panel. The ordinance, Mount Ephraim, N.J., Code § 99-15B (1), (2) (1979), described "permitted uses" in the community's small commercial zone and prohibited all other uses. The Supreme Court struck down the ordinance, which had been construed by the state courts to forbid nude dancing, because it "prohibit[ed] a wide range of expression long been held to be within the protection of the First and Fourteenth Amendments" and the municipality's alleged justifications for its blanket prohibition were inadequate. *Schad,* 452 U.S. at 65. Writing for the majority, Justice White held that "when a zoning law infringes on a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* at 68. In this case, none of Mount Ephraim's asserted justifications for its ordinance could withstand this heightened scrutiny, since it had "presented no evidence" to defend its claims that problems "associated with live entertainment, such as parking, trash, police protection, and medical facilities" were "more significant than those associated with various permitted uses," that "live entertainment [was] incompatible" with the permitted uses, or that "the kind of entertainment appellants wish to provide [was] available in reasonably nearby areas." *Id.* at 73-76.

4. *Renton v. Playtime Theatres, Inc.*

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), the Court upheld a city's zoning ordinance that unlike the ordinance in *Young* attempted to regulate the location of adult movie theaters by concentrating them rather than by dispersing them.[8] Writing for the majority, Justice Rehnquist relied on *Young* but outlined a new analytical framework for evaluating this type of regulation.

The Court's analysis involved three steps. First, the Court found that since the *Renton* ordinance did not ban adult theaters altogether but merely regulated where they could be located, the ordinance was properly analyzed as a time, place and manner regulation. *Id.* at 46. Second, the Court considered whether the ordinance was content-based or content-neutral. The Court noted that content-based ordinances are presumptively invalid and subject to strict scrutiny, but found that the *Renton* ordinance did not fall into that category, since it "aimed not at the content of the films shown at adult motion picture theaters but rather at the secondary effects of such theaters on the surrounding community." *Id.* at 47 (emphasis added). Third, the Court considered whether, as a content-neutral time, place and manner regulation, the ordinance was "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication," *id.* at 50, and found that these conditions were met. The Court rejected the Ninth Circuit's contention that the city's justifications for the

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[8] The ordinance prohibited any adult movie theater "from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school," 475 U.S. at 44, a prohibition which effectively left only "520 acres, or [approximately] five percent of the entire land area of *Renton*, open to use as adult theater sites." *Id.* at 53.

ordinance were "conclusory and speculative" because "the *Renton* ordinance was enacted without the benefit of studies relating to 'the particular problems or needs of *Renton*.'" *Id.* Instead, the Court held that "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52.

5. *Barnes v. Glen Theatre, Inc.*

The Court examined the constitutionality of restrictions on adult entertainment again in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991). Unlike *Young*, *Schad*, and *Renton*, *Barnes* involved a public indecency statute rather than a zoning ordinance. Confronting this issue for the first time, the Court upheld an Indiana indecency statute that had the effect of requiring dancers in adult establishments to wear pasties and G-strings. *Barnes*, 501 U.S. at 572. However, although five justices agreed that the statute should be upheld, they were again unable to agree on a single rationale.

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, recognized that the Court's previous decisions in *LaRue*, *Doran*, and *Schad* implied that nude dancing was "expressive conduct protected by the First Amendment." *Id.* at 565. Accordingly, Chief Justice Rehnquist analyzed the Indiana statute in light of the four-part test for expressive conduct established in *O'Brien*. Applying this test, he found

that the statute was justified "despite its incidental limitations on some expressive activity." *Id.* at 567.[9]

Justice Scalia and Justice Souter each wrote separately, concurring in the judgment of the Court but upholding the Indiana statute on different grounds from each other and from the plurality. Justice Scalia found that the statute withstood constitutional challenge, not because it survived the *O'Brien* test, but because "as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* By contrast, Justice Souter agreed with the plurality that nude dancing was expressive conduct protected by the First Amendment and appropriately analyzed under *O'Brien*. However, he parted company with them over how to understand and apply *O'Brien's* second

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[9] The Rehnquist plurality found each of *O'Brien's* four conditions was satisfied. First, the public nudity statute was clearly in the State's constitutional power to enact. *Barnes,* 501 U.S. at 567. Second, the statute furthered the State's substantial interest in "protecting societal order and morality." *Id.* Third, this interest was unrelated to the suppression of free expression, since Indiana proscribed nudity across the board and did not specifically target the erotic message conveyed by nude dancing. *Id.* at 571 ("[T]he requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic . . . . [p]ublic nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity."). Finally, Indiana's statute satisfied the fourth requirement of O'Brien that any incidental restriction on First Amendment freedoms be no greater than essential to further the government's interests. "It is without cavil that the public indecency statute is 'narrowly tailored'; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose." *Id.* at 572.

requirement that government regulation of expressive conduct further important or substantial government interests. According to Justice Souter, these interests need not be limited to "protecting societal order and morality," as the plurality argued. Instead, like the zoning cases, they should be interpreted to include "the State's substantial interest in combating the secondary effects of adult entertainment establishments . . . [such as] prostitution, sexual assault, and other criminal activity." *Id.* at 582-83.

Because Justice Souter provided the narrowest grounds for the judgment of the Court in *Barnes*, his concurrence constitutes the holding of that case under the rule of *Marks v. United States* for interpreting fragmented Supreme Court decisions.[10] Hence his opinion demands close scrutiny. In identifying secondary effects as an appropriate basis for upholding the Indiana statute, Justice Souter relied heavily on the Supreme Court's decisions in *Renton* and *Young*. Though neither of these cases involved nude dancing, Justice Souter reasoned that because nude dancing and the forms of adult entertainment at issue in *Young* and *Renton* were "plainly of

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[10] In *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977), the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Justice Souter's concurrence in *Barnes* constitutes the holding of that case, since he concurred in the Court's judgment on the narrowest ground. *See, e.g., Ben's Bar, Inc., v. Village of Somerset*, 316 F.3d 702, 718, n. 4 (7th Cir. 2003) ("Under *Marks*, Justice Souter's concurrence is the controlling opinion in *Barnes*, as the most narrow opinion joining the judgment of the Court"); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998) ("Justice Souter presented the narrowest resolution of the issues in *Barnes*")

the same character," they were "likely to produce the same pernicious effects." *Barnes,* 501 U.S. at 584. He thus concluded that the *Renton* Court's "recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects," *id.*, could be applied to the specific case of nude dancing. Indiana could reasonably rely on the findings and experiences of other similar localities in order to conclude that forbidding nude dancing furthered its interest in preventing secondary effects, and, in that case, the state need not justify those restrictions by its own local studies. *Id.* at 584. Hence *O'Brien's* second prong was satisfied. So too was *O'Brien's* third condition, since the State's interest in banning nude dancing was not related to the suppression of free expression but resulted from a simple correlation of nude dancing with secondary effects. *Id.* at 585. Finally, Justice Souter found that *O'Brien's* fourth requirement was also met, since the restrictions at issue in *Barnes* were minor. "Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Id.* at 587.

6. *City of Erie v. Pap's A.M.*

The Court revisited the issue of nude dancing in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). In another splintered opinion, the Court upheld a public indecency ordinance similar to the statute at issue in *Barnes*. *Pap's A.M.*, 529 U.S. at 283. Writing for a four-justice plurality, in an opinion stating the holding of the Court under Marks, Justice O'Connor began by "clarify[ing] that government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Id.* at 289.

Justice O'Connor then concluded that Erie's ordinance was justified under the four requirements of *O'Brien*. The first and third of those requirements- that the regulation was within the government's power to enact and that the government's interest was unrelated to the suppression of expression- were easily satisfied. *Id.* at 296, 301. In connection with the second *O'Brien* requirement that the government's regulation further an important or substantial interest, Justice O'Connor reasoned that the evidentiary standard described in *Renton* and in Justice Souter's concurrence in *Barnes* was the appropriate measure of whether Erie's ordinance furthered the city's interest in combating the harmful secondary effects associated with nude dancing. As she emphasized, that evidentiary requirement was a weak one:

> In terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." [*Renton*] Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young* . . . [and] *LaRue*, it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young*] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and [*Young*]. . . . [T]he evidentiary standard

> described in *Renton* controls here, and Erie meets that standard.

Id. at 296-97 (internal citations omitted). Finally, Justice O'Conner found that *O'Brien's* fourth condition that any incidental limitation on protected expression be no greater than necessary was satisfied, since "[t]he requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests . . . [that] leaves ample capacity to convey the dancer's erotic message." *Id.* at 301.

Justice Scalia, joined by Justice Thomas, agreed that Erie's ordinance was constitutional, but did so on an entirely different basis. Reiterating the view he expressed in *Barnes*, Justice Scalia deemed the ordinance to be a total ban on public nudity, which was aimed at conduct, not expression, and thus was not subject to First Amendment scrutiny at all. *Id.* at 307-08. Meanwhile, Justice Souter filed a concurring and dissenting opinion, agreeing with the plurality that the *O'Brien* test governed, but dissenting from the Court's judgment in the case because he disagreed with how the plurality applied the second prong of *O'Brien*. On Justice Souter's view, the record failed to reveal "any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy." 529 U.S. 277 at 314. As such, the record did not permit the conclusion "that Erie's ordinance is reasonably designed to mitigate real harms." *Id.* at 317. Since, on his view, *O'Brien's* second condition was not satisfied, Justice Souter would have remanded the case to permit Erie to attempt to make that factual showing.[11]

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[11] Justice Souter acknowledged that his partial dissent "rests on a demand for an evidentiary basis that I failed to make when I

7. *City of Los Angeles v. Alameda Books, Inc.*

The Court's most recent case involving adult entertainment was *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002), a case in which adult businesses challenged the constitutionality of a city zoning ordinance forbidding two or more such businesses from operating in the same building. The Supreme Court reversed a lower court judgment granting summary judgment to the adult businesses, holding that Los Angeles could reasonably rely, at this stage of the litigation, on a police department study of the effect of adult businesses on crime patterns to overcome summary judgment. Once again, however, no single rationale justifying the result enjoyed the assent of five Justices.

The narrow question presented in *Alameda Books* was the appropriate standard "for determining whether an ordinance serves a substantial government interest under *Renton*." 121 S. Ct. at 1733. The plurality opinion, written by Justice O'Connor, found that by relying on a 1977 study showing that concentrations of adult establishments are associated with higher rates of prostitution, assaults, and other secondary effects, Los Angeles had complied with *Renton's* evidentiary requirement, at least for the purpose of surviving summary judgment motion. *Id.* Hence the plurality held that summary

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concurred in *Barnes*. I should have demanded the evidence then, too . . . after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted." *Pap's A.M.*, 529 U.S. at 316-317. Justice Stevens, joined by Justice Ginsburg, dissented, concluding that the ordinance was a "patently invalid" content-based ban on nude dancing that effectively censored protected speech. *Id.* at 332.

judgment for the adult businesses should be reversed and the case remanded for further proceedings. *Id.* at 1738. The plurality explained, however, that *Renton's* requirement that a municipality act on evidence "reasonably believed to be relevant" to the problem of secondary effects does not mean

> . . . that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 1736.[12]

Justice Kennedy concurred in the judgment of the Court but wrote separately because he agreed with the dissent that the Los Angeles ordinance was not content- neutral, and because he feared that the plurality opinion "might constitute a subtle expansion" of *Ren[illegible]*. *Id. at 1739.* On the issue of content-neutrality, the O'Connor plurality took the position

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[12] In addition to joining the plurality opinion, Justice Scalia wrote separately to emphasize his view that the plurality's secondary effects analysis was unnecessary because the First Amendment "does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Id.* at 1738-39.

that the Court should not decide whether the Los Angeles ordinance was content-neutral since the Ninth Circuit had not yet passed on the matter. *Id.* at 1737. Justice Kennedy disagreed, joining the four dissenters in characterizing the application of the content-neutral label to secondary effects ordinances like Los Angeles' as a "fiction," because "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. . . . These ordinances are content based and we should call them so." *Id.* at 1741. Nevertheless, unlike the dissent, Justice Kennedy held that secondary effects zoning ordinances were subject to intermediate scrutiny even though they were content-based. Accordingly, he concluded that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.*

With respect to *Renton*, Justice Kennedy distinguished two questions entering into whether an ordinance serves a substantial government interest under *Renton*: (1) "what proposition does a city need to advance in order to sustain a secondary effects ordinance?", *id.* at 1741; and (2) "how much evidence is required to support the proposition?" *Id.* As Justice Kennedy saw it, the plurality gave the correct answer to the second question, but skipped the first, to which more attention must be paid. To justify a content-based zoning ordinance, he argued, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 1742. The key issue, in other words, is "how speech will fare" under the ordinance:

> [T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. . . . It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech."

Id.

Turning to the second question, Justice Kennedy agreed with the plurality that "very little evidence" was required of a municipality to support the claim that its ordinance serves to reduce secondary effects without substantially reducing speech. *Id.* at 1743. In this case, Los Angeles could reasonably conclude based on its 1977 study that preventing multiple adult businesses from operating under one roof was "reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." *Id.* Justice Kennedy acknowledged that "[i]f these assumptions can be proved unsound at trial, then the [Los Angeles] ordinance might not withstand intermediate scrutiny." *Id.* Nonetheless, he concluded that these considerations were sufficient to determine that the ordinance was not facially invalid and should survive a motion for summary judgment. *Id.* Because he concurred in the judgment of the Court on the narrowest grounds, Justice Kennedy's concurrence represents the Court's holding in *Alameda Books* under *Marks*. *See, e.g.*, *Ben's Bar, Inc.*, 316 F.3d 702, 722 (7th Cir. 2003) (identifying Justice Kennedy's opinion as controlling); *SOB, Inc., v. County of Benton*, 317 F.3d 856, 862 n.1 (8th Cir. 2003) (same).

8. Two Types of Regulation: Zoning Ordinances and Public Nudity Ordinances

Based on the foregoing, we conclude that while the Supreme Court has utilized closely related, and at times overlapping, analytical frameworks to evaluate adult entertainment zoning ordinances, on the one hand, and public nudity ordinances, on the other, these two types of regulatory action, both of which may target the perceived "secondary effects" of adult entertainment, must be distinguished and evaluated separately. Zoning ordinances regulating the conditions under which adult entertainment businesses may operate should be evaluated under the standards for time, place, and manner regulations set forth in *Renton* and reaffirmed in *Alameda Books*. Accordingly, a reviewing court must perform a three-part analysis to determine whether the zoning ordinance violates the First Amendment: first, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication. *Renton,* 475 U.S. at 46-50; *Alameda Books,* 122 S. Ct. at 1733-34.

By contrast, public nudity ordinances, insofar as they are content-neutral, should be evaluated under the four-part test for expressive conduct set forth in *O'Brien* and utilized by the Court in *Barnes* and *Pap's A.M.*. According to this test, public nudity ordinances that incidentally impact protected

expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest. *O'Brien,* 391 U.S. at 367-77; *Pap's A.M.,* 529 U.S. at 289; *Barnes,* 501 U.S. at 567.

The significance of *Alameda Books* is that it clarifies how the court is to interpret the third step of the *Renton* analysis as well as the second prong of the *O'Brien* test, which are, to a certain extent, virtually indistinguishable. In deciding whether a given ordinance "is designed to serve" (*Renton*) or "furthers" (*O'Brien*) the government's alleged interest in combating the negative secondary effects associated with adult entertainment, the standard we apply is the one described in *Renton* and utilized in *Barnes, Pap's, A.M.*, and *Alameda Books*. According to this standard, the government need not conduct local studies or produce evidence independent of that already generated by other municipalities to demonstrate the efficacy of its chosen remedy, "so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that [it] addresses.'" *Pap's, A.M.,* 529 U.S. at 296 (plurality opinion) (*quoting Renton,* 475 U.S. at 51-52). However, the government's evidence "must fairly support [its] rationale." *Alameda Books,* 122 S. Ct. at 1738 (plurality opinion); *see also id.* at 1743 (Kennedy, J., concurring). Further, plaintiffs challenging the ordinance after passage must be given opportunity to "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale, or by furnishing

evidence that disputes the municipality's factual findings." *Id.*[13]

Having summarized these precedents, we turn now to their application to the two ordinances before us.

B. Ordinance 98-46

Ordinance 98-46 is not an ordinance directly regulating expressive conduct, but a zoning ordinance that imposes various physical requirements on "all adult dancing establishments" in Manatee County, including prohibiting private rooms, setting minimum levels of lighting, and

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[13] On the basis of these Supreme Court decisions, some federal courts have expressed doubt over whether *Renton* or *O'Brien* should be used to evaluate adult entertainment ordinances and others have decided that the two tests are interchangeable. *See, e.g., LLEH, Inc. v. Wichita County, Texas,* 289 F.3d 358, 365 (5th Cir. 2002) (expressing uncertainty as to whether courts should use "the test for time, place, or manner regulations, described in *Renton* . . . or the four-part test for incidental limitations on First Amendment freedoms established in *O'Brien*"); *Ben's Bar, Inc.,* 316 F.3d 702, 704 (7th Cir. 2003) (finding that "the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable"). *Cf. Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (stating that "in the last analysis" the *O'Brien* test is "little, if any, different from the standard applied to time, place, or manner restrictions"). Indeed, the District Court appears to have drawn a similar conclusion, since it evaluated both of Manatee County's ordinances under the four-part test outlined in *O'Brien*. However, based upon our review of the relevant case law, we conclude that the two types of ordinances remain distinguishable and should be evaluated separately.

requiring both an entrance room or lobby and an additional room of at least 1,000 square feet in size. The ordinance also allows the County Sheriff to search the premises of such businesses without a warrant. Because these regulations apply only to those businesses purveying a form of sexually explicit speech, they trigger First Amendment scrutiny under the line of zoning cases beginning with *Young* and *Schad* and culminating in *Renton* and *Alameda Books*. Hence a reviewing court must ask (1) whether Ordinance 98-46 constitutes a total ban, which would be impermissible, or merely a time, place and manner regulation; (2) whether, if it is a time, place, and manner regulation, Ordinance 98-46 should be subject to strict or intermediate scrutiny; and (3) whether, if Ordinance 98-46 is held to be subject to intermediate scrutiny,[14] it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication. *Alameda Books,* 122 S. Ct. at 1733-34; *Renton,* 475 U.S. at 46-50.

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[14] Although both the Court in *Renton* and the plurality in *Alameda Books* used the labels "content-neutral" and "content-based" to characterize the second step of the *Renton* analysis, they did so in order to determine whether the regulations before them should be subject to intermediate or strict scrutiny. *See Renton,* 475 U.S. at 47-49; *Alameda Books,* 122 S. Ct. at 1733-34. In his *Alameda Books* concurrence, Justice Kennedy joined the four dissenters in jettisoning the "content-neutral" label as applied to zoning ordinances that "describe speech by content" on their face, 122 S. Ct. at 1741, but he too continued to characterize the key question in terms of levels of scrutiny, and concluded that such ordinances were subject to intermediate scrutiny even though they were content-based. Thus, the substance of *Renton's* second step remains unchanged after *Alameda Book* and properly involves determining whether an adult entertainment zoning ordinance is subject to strict or intermediate scrutiny.

Under this Court's precedent, we must apply this third step by asking whether Ordinance 98-46 is "narrowly tailored" to serve the government interest at issue and allows for reasonable alternative avenues of expression. *See International Eateries of America, Inc., v. Broward County, Fla.*, 941 F.2d 1157, 1161-62 (11th Cir. 1991) (interpreting the third step of the *Renton* analysis to require narrow tailoring); *Lady J. Lingerie, Inc., v. City of Jacksonville,* 176 F.3d 1358, 1361 (11th Cir. 1999) (same). Additionally, in deciding whether Ordinance 98-46 is narrowly tailored to serve a substantial government interest, we must apply the evidentiary requirement described in *Renton* and clarified by the Court in *Alameda Books*. According to this requirement, the County, when enacting the ordinance, must have relied on evidence it "reasonably believed to be relevant" to the problem of secondary effects. *Renton,* 475 U.S. at 51-52. Further, the County's evidence "must fairly support [its] rationale" and plaintiffs challenging the ordinance must be given opportunity to "cast direct doubt on this rationale" with evidence of their own. *Alameda Books,* 122 S. Ct. at 1738.

In this case, it is unnecessary to perform the first two steps of the *Renton* analysis, because even if we were to decide that Ordinance 98-46 is a valid time, place, and manner regulation that is properly subject to intermediate scrutiny, the record reveals that the Manatee County Board of County Commissioners, when enacting Ordinance 98-46, failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects. *Renton* stands in part for the proposition that a municipality enacting a zoning ordinance targeting secondary effects must rely upon evidence it reasonably believes to be relevant for this purpose at the time of enactment. This is the clear implication of the Court's holding that "[t]he First

Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 475 U.S. at 51-52 (emphasis added). Because the County failed to rely on any evidence linking the passage of Ordinance 98-46 to the prevention of secondary effects, it cannot be said that the County has satisfied even *Renton's* weak condition that it rely on evidence "reasonably believed to be relevant" to the problem of secondary effects or *Alameda Books'* condition that its evidence "fairly supports [its] rationale for enacting its ordinance." Instead, based on the record before us, we conclude that the County has not met its burden to show that Ordinance 98-46 was narrowly tailored to serve the County's interest in combating secondary effects.

Manatee County argues that it "was not required to develop a specific localized evidentiary record supporting" Ordinance 98-46 and could reasonably "rely on the evidentiary foundation set forth in prior cases" such as *Barnes* and *Renton*. Brief for Appellee, at 20. However, these statements, though accurate, do not validate the County's contention that Ordinance 98-46 withstands intermediate scrutiny. This Court has held that *Renton* requires at least some pre-enactment evidence. *See, e.g., Ranch House v. Amerson,* 238 F.3d 1273, 1283 (11th Cir. 2001) ("[S]tate actors in Defendants' position must cite to some meaningful indication-in the language of the code or in the legislative proceedings-that the legislature's purpose in enacting the challenged statute was a concern over secondary effects rather than merely opposition to proscribed expression") (emphasis original); *Flanigan's Enterprises, Inc., v. Fulton County, Ga.,* 242 F.3d 976, 986 (11th Cir. 2001) (the court may not simply

presume the evidence needed to sustain a secondary effects ordinance because "where the right to free speech is at issue, the government bears the burden of showing that the articulated concern has more than merely speculative factual grounds, and that it actually was a motivating factor"). To satisfy this burden, the County submitted to the District Court two large volumes of the evidence the Board relied upon when enacting both Ordinance 98-46 and Ordinance 99-18. R.1-30. All of this evidence, however, was directed exclusively toward Ordinance 99-18, the County's general nudity ordinance, and was presented to the Board only after Ordinance 98-46 was enacted. Further, Ordinance 98-46 incorporates no findings of secondary effects or references to relevant case law. Unlike Ordinance 99-18, therefore, the record reveals that the County failed to rely on any evidentiary foundation when enacting Ordinance 98-46.[15]

In rejecting Appellants' constitutional challenge, the District Court expressly considered "the evidence presented

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[15] Despite an extensive search, the only possible evidentiary basis for Ordinance 98-46 we have been able to locate in the record is a passing reference during the November 24, 1998 public hearing to a similar ordinance enacted by the City of Jacksonville, Florida, "which held up under appeal." R.1-30, Tab 4. We find this oblique, isolated reference to the ordinance at issue in *Lady J. Lingerie, Inc., v. City of Jacksonville,* 973 F. Supp. 1428 (M.D. Fla. 1997), insufficient to satisfy the County's evidentiary burden under *Renton*. As the Fifth Circuit has observed, it is not enough under *Renton* "simply to tailor one ordinance to another that has survived judicial review." *SDJ, Inc. v. Houston,* 837 F.2d 1268, 1274 (5th Cir. 1988). Instead, the County "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Alameda Books,* 122 S. Ct. at 1742 (Kennedy, J., concurring).

to the Board at the time it enacted" Ordinances 98-46 and 99-18. However, the District Court neglected to treat the two ordinances as distinct in this regard. Instead, the District Court collapsed the two ordinances and their accompanying evidence into a single analysis. While we agree with the District Court that the County has met its initial burden under *Renton* to rely upon evidence it "reasonably believed to be relevant" when adopting Ordinance 99-18, the same cannot be said for Ordinance 98-48, which the record reveals was adopted without any pre-enactment evidence.

In addition to considering the evidence presented to the Board at the time it enacted the ordinances, the District Court also implied a different view toward the issue of pre-enactment evidence. Relying on the Third Circuit's decision in *Phillips v. Borough of Keyport,* 107 F.3d 164 (3d Cir. 1997), the District Court suggested in a footnote to its opinion that Manatee County was not required to rely on pre-enactment evidence, so long as the County was prepared to present a "factual basis for its legislative judgment . . . in court when that judgment [was] challenged." However, this Court has consistently interpreted *Renton* to require pre-enactment evidence, as the County's own statement of issues raised on appeal recognizes. *See, e.g., Ranch House,* 238 F.3d at 1282-84;*Flanigan's,* 242 F.3d at 985-87. *See also* Brief of Appellee at 1 (stating issue as "[w]hether the District Court . . . correctly found that the ordinances were based on an adequate record before the Board of County Commissioners").[16] Moreover, we find *Phillips*' reasoning

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[16] The Third Circuit appears to be an outlier on this issue. Other circuits have also interpreted *Renton* to require at least some pre-enactment evidence. *See, e.g., D.H.L. Assocs., v. O'Gorman,* 199 F.3d 50, 57-58 (1st Cir. 1999) (reviewing whether town considered secondary effects evidence "prior to the ordinance's

difficult to square with *Renton*, whose very language refers to pre-enactment evidence, as well as with the Supreme Court's most recent treatment of this issue in *Alameda Books*.[17]

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enactment" to determine whether *Renton* was satisfied); *Hickerson v. City of New York,* 146 F.3d 99, 105 (2d Cir. 1998) ("a barren legislative record will not suffice under the First Amendment"); *11126 Baltimore Blvd. v. Prince George's County, Md.,* 886 F.2d 1415, 1423 (4th Cir. 1989) ("Clearly, trial testimony and 'supplemental' materials cannot sustain regulations where there is no evidence in the pre-enactment legislative record") (emphasis original); *SDJ, Inc.,* 837 F.2d at 1274 (5th Cir. 1988) ("We are persuaded that the City met its burden under [*Renton*] to establish that there was evidence before it from which the Council was entitled to reach its conclusion"); *Christy v. Ann Arbor,* 824 F.2d 489, 493 (6th Cir. 1987) ("Although . . . a city need not conduct new independent studies to justify adult business zoning ordinances, [we] have required some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses"); *Ben's Bar, Inc.,* 316 F.3d at 725 (7th Cir. 2003) ("In enacting the ordinance, the Village Board relied on numerous judicial decisions, studies from eleven different cities, and . . . findings . . . to support its conclusion that adult entertainment produces adverse secondary effects"); *SOB, Inc.,* 317 F.3d at 862 (8th Cir. 2003) (identifying "the fighting issue in this case" as whether the County "had sufficient evidence" of secondary effects "before enactment" to justify adopting its ordinance); *Tollis Inc. v. San Bernardino County,* 827 F.2d 1329, 1333 (9th Cir. 1987) ("The County must show that in enacting the particular limitations ... it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects"); *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683, 690 (10th Cir. 1998) (finding that a "completely barren legislative record" does not satisfy *Renton*).

[17] *See Alameda Books,* 122 S. Ct. at 1738 (resolving dispute raised by Respondents' argument that Los Angeles could not reasonably rely on post-enactment evidence, not by finding

In sum, although *Renton's* evidentiary burden for the passage of a secondary effects zoning ordinance is not a rigorous one and the Supreme Court has made plain its intention to give municipalities wide latitude to design and implement solutions to problems caused by adult entertainment without compiling an extensive evidentiary record, see, e.g., *Alameda Books,* 122 S. Ct. at 1736-37, 1742-43, this leeway is not without limits. To satisfy *Renton*, any evidence "reasonably believed to be relevant"-including a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion-may form an adequate predicate to the adoption of a secondary effects ordinance, but the government must rely on at least some pre-enactment evidence. Because Ordinance 98-46 is deficient in this regard, we hold that the District Court erred in finding that Ordinance 98-46 as it applies to these plaintiffs on this record survives intermediate scrutiny. We therefore reverse the District Court's grant of summary judgment to the County with respect to this ordinance.[18]

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respondents' argument inapposite, as would be appropriate if *Renton* did not require pre-enactment evidence, but by noting that Los Angeles had, in fact, relied on pre-enactment evidence).

[18] The Adult Lounges argue that Ordinance 98-46 also violates the Fourth Amendment's protection against unreasonable searches, the Fifth Amendment's protection against invalid takings, the Fourteenth Amendment's protection against violations of equal protection, and the Contract Clause's protection against laws impairing the obligation of contracts. Because we sustain the Adult Lounges' First Amendment challenge to Ordinances 98-46 we decline to address these additional claims at this time.

C. Ordinance 99-18

In contrast to Ordinance 98-46, Ordinance 99-18 is a general prohibition on public nudity, not a zoning ordinance. The ordinance regulates nudity directly, while impacting the expressive element of nude dancing only incidentally. The Supreme Court has held that this type of government regulation, which "does not target nudity that contains an erotic message," but rather "bans all public nudity, regardless of whether that nudity is accompanied by expressive activity," is content-neutral and thus "should be evaluated under the framework set forth in *O'Brien.*" *Pap's A.M.*, 529 U.S. at 289-90. Accordingly, we must determine the constitutionality of Ordinance 99-18 as applied to the Adult Lounges by analyzing it under *O'Brien's* four-part test.

1. *O'Brien's* First and Third Prongs

Ordinance 99-18 easily satisfies the first and third prongs of *O'Brien*. The first *O'Brien* factor is whether the regulation is within the constitutional powers of the government. *O'Brien,* 391 U.S. at 376. Here, Ordinance 99-18 is within Manatee County's police powers. *Pap's A.M.*, 529 U.S. at 296; *Barnes,* 501 U.S. at 567. Likewise, Ordinance 99-18 clearly satisfies the third *O'Brien* condition, which requires the government's interest to be unrelated to the suppression of free expression, because the ordinance bans all public nudity, not just nudity in adult dancing establishments. The Supreme Court has repeatedly held this type of general ban to be unrelated to the suppression of free expression. *Pap's A.M.*, 529 U.S. at 296; *Barnes,* 501 U.S. at 567.

2. *O'Brien's* Second Prong

Under *O'Brien*'s second prong, the County must demonstrate that Ordinance 99-18 furthers the County's substantial interest in preventing secondary effects associated with adult entertainment. To this end, the County may rely upon any evidence that is "reasonably believed to be relevant" to its interest in preventing secondary effects. *Renton, 475 U.S. at 51-52*. However, the County cannot rely on "shoddy data or reasoning" and its "evidence must fairly support [its] rationale." *Alameda Books,* 122 S. Ct. at 1736. Further, plaintiffs must be given the opportunity to "cast direct doubt on this rationale" with evidence of their own. *Id*. If plaintiffs succeed in doing so, "the burden shifts back to the [County] to supplement the record with evidence renewing support for a theory that justifies its evidence." Id. (citing *Pap's A.M.*, 529 U.S. at 298).

Here, although Ordinance 99-18 prohibits public nudity across the board and not just nudity occurring in adult entertainment establishments, Manatee County expressly relied on its determination that public nudity "increases incidents of prostitution, sexual assaults and batteries, [and] other criminal activity" when it adopted Ordinance 99-18. The County also relied on a report prepared by the Florida Family Association, "Evidence of Secondary Adverse Effects of Sexually Oriented Businesses," which included testimony from the sheriff of nearby Pinellas County concerning "the proliferation of prostitution, sexual contact and lewd acts that take place in nude dancing establishments in Pinellas County," and from the Director of Communicable Diseases of the Pinellas County Health Department concerning communicable diseases that "are transmitted by unprotected sexual activity that takes place in [such] establishments." R.1-30, Tab 9. In *Pap's A.M.*, the Court found that a

municipality's own findings and "reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing" were a sufficient evidentiary basis. 529 U.S. at 297. Hence the County's findings, and the evidence it submitted to the District Court in conjunction with its motion for summary judgment, satisfy the County's pre-enactment burden as set forth in *Renton* and reaffirmed in *Pap's, A.M.*. *Id.*; *Renton,* 475 U.S. at 51-52.

However, since the Adult Lounges have challenged the sufficiency of the County's evidence, under *Alameda Books* and *Pap's A.M.* our inquiry does not end here. We must next determine whether the Adult Lounges have managed to "cast direct doubt" on the County's rationale for Ordinance 99-18. *Alameda Books,* 122 S. Ct. at 1736 (plurality opinion) (citing *Pap's A.M.,* 529 U.S. at 298); *see also id.* at 1742-44 (Kennedy, J., concurring). Based on the evidence before us, it appears that the Adult Lounges have accomplished this task.

In response to the County's motion for summary judgment, the Adult Lounges placed into the record a two-volume "Appendix in Support of Peek-A-Boo Lounge and Temptations II's Opposition to Proposed Manatee County Public Nudity Ordinance [No. 99-18]," which it had previously submitted to the Manatee County Planning Commission during the public hearings the Commission held prior to the adoption of Ordinance 99-18. R.1-30, Tabs 10-11. These materials included satisfactory health and safety inspection reports of plaintiffs' businesses issued by the Florida Department of Health and the Cedar Hammock Fire Department, R.1-30, Tab 10, at Ex. P, and Tab 11, at Ex. J; incident reports of criminal activity near the Adult Lounges and elsewhere showing lower crime rates near Appellants' businesses than in surrounding areas, R.1-30, Tab 10, at Ex. Q-S; recent sales and assessment data revealing an increase in

property values for property located near Appellants' businesses, R.1-30, Tab 10, at Ex. M-N, U, and Tab 11, at Ex. K-M; and an award given in 1996 to the Peek-A-Boo Lounge by the Manatee County Sheriff for its "outstanding contribution to the community," R.1-30, Tab 11, at Ex. C.

In further response to the summary judgment motion, the Adult Lounges also submitted three expert studies specifically addressing local conditions in Manatee County which purported to show that there was no evidence connecting their businesses with negative secondary effects. Dr. Terry A. Danner, Chair of the Department of Criminology at St. Leo University, conducted a study utilizing the County's own crime statistics that examined the criminogenic effects of the Appellant's specific businesses and found that Appellants businesses did not cause such effects.[19] Dr. Randy D. Fisher, Associate Professor of Psychology and Director of the Survey Research Laboratory at the University of Central Florida,

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[19] The research question posed by the Danner study was "whether or not there existed objective and quantifiable evidence" that Appellants' businesses "have been criminogenic businesses in such a way that their operation has resulted in a significant and sustained increase in crime volumes within the urban areas of their location." To address this question, the study utilized local crime statistics for the period 1992-1999 for seven offense types (murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft) that were collected by the Manatee County Sheriff's office on a grid-by-grid basis for approximately 400 more-or-less uniformly sized geographic grids within the county, including those grids containing the Adult Lounges. Analyzing this data-the only such data available-by a variety of statistical measures, the Danner study concluded that "there was insufficient evidence . . . to establish a causal connection between the operation of [the Adult Lounges] and crime volumes" in their respective grids and adjoining areas.

prepared a study titled "Evidence for the Adverse Secondary Effects of Adult Entertainment: The Manatee County Record," which examined the record submitted by the County in support of Ordinance 99-18 and concluded that because "the only statistical data provided [in the record] showed lower rates of crime . . . [and] substantial increases in property values, both in the long run and in the shorter run, in the areas around the existing adult businesses," the specific evidence relating to the Appellants' businesses contradicted any suggestion that "the two existing adult businesses in Manatee County have 'adverse secondary effects.'"[20] Finally, Mr. Richard Schauseil, a licensed Florida real estate agent, conducted an extensive "Market Study and Report" on the effects of Appellants' businesses on neighboring properties which found that there were "absolutely no signs of any negative effects on adjoining property values or conditions" resulting from Appellants' businesses.[21]

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[20] On the basis of this study, which included a comprehensive, document-by-document review of the County's pre-enactment evidence, Dr. Fisher also found that of the nineteen foreign studies contained in the Florida Family Association report- the only set of empirical studies relied upon by the County when it adopted Ordinance 99-18- only two were conducted with "any modicum of appropriate research methodology." The two exceptions were the Austin report and the Indianapolis report. The former, written in 1986 by the city of Austin's Office of Land Development Services, utilized "calls to the Austin Police Department from January 1, 1984 through December 31, 1985" and surveys "of [Austin] real estate professionals" as its database. The latter, written in 1984 by the Indianapolis Department of Metropolitan Development, also consisted only of local data that was collected by that Department from 1978 to 1982. R.1-30, Tab 9, at Ex. N-O.

[21] The Schauseil study examined real estate sales and permit histories to determine the effects of the Adult Lounges on the

Taken together, the Adult Lounges argue that this evidence "casts direct doubt" on the County's alleged rationale in enacting Ordinance 99-18 "by demonstrating that [the County's] evidence does not support its rationale" and "by furnishing evidence that disputes the [County]'s factual findings." *Alameda Books,* 122 S. Ct. at 1736. Given the record and procedural posture of this case, we are inclined to agree. Although Manatee County met its minimal initial burden under *Renton* to rely on evidence it reasonably believed to be relevant to addressing the problem of secondary effects, in this case Appellants have successfully cast doubt on the County's rationale by placing into the record substantial and unanswered factual challenges to the County's findings in the specific areas of crime, decreased property values, aesthetic blight, and other secondary effects.

In *Alameda Books*, the District Court granted summary judgment to the adult businesses challenging the constitutionality of a secondary effects ordinance. The Supreme Court reversed and held that the city had presented sufficient evidence to overcome a facial challenge to that ordinance. *Alameda Books,* 122 S. Ct. at 1738. By contrast, here summary judgment was granted to the County, and it is the adult businesses, whose constitutional challenge we

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market values and economic viability of adjoining commercial properties. The author found steadily appreciating market values and active permit histories for properties adjacent to both of the Adult Lounges, concluding that "the sales record for the two Subject Commercial Areas has shown appreciation . . . [t]he vacancy rate and lease rate for lease space and properties offered for sale has shown a stable and viable economic area . . . [and] [t]he number of open and viable businesses in each Subject Commercial Area demonstrates strong and stable economic conditions."

understand to be an "as applied" challenge, who claim they have presented sufficient evidence to withstand that judgment. Summary judgment is appropriate, of course, only where the evidence before the court shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Fed. R. Civ. P. 56. In making this determination, the court "must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). In this case, the District Court failed to draw all justifiable inferences in favor of the Adult Lounges as to the credibility and weight of their evidence, which when properly interpreted does appear to create a genuine issue of material fact under prevailing legal standards as to whether Ordinance 99-18 furthers the County's asserted interests.

Significantly, the County has not attempted to counter the Adult Lounges' evidence with local studies of its own. We are not dealing, therefore, with a case involving a battle of competing experts. Rather, as the record now stands, we have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects. Under these circumstances, we cannot credit the County with complying with *Renton's* narrow tailoring requirement, which requires that a secondary effects ordinance be drawn to affect only that category of business

"shown to produce the unwanted secondary effects." *Renton,* 475 U.S. at 52 (emphasis added). *See also Flanigan's,* 242 F.3d at 976-97 (finding it "unreasonable for Defendants to rely on outdated, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions," especially where adult businesses were not "a recent addition to Fulton County neighborhoods" but "have continually operated . . . for nearly a decade"); *id* at 987 (affirming that "the constitutionality of an ordinance will depend on local conditions").

We note that the fact that the Adult Lounges have managed, in their "as applied" challenge, to cast doubt on the County's basis for enacting Ordinance 99-18 does not mean the ordinance could not ultimately survive intermediate scrutiny. Rather, under *Alameda Books*, at this point summary judgment is inappropriate and "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books,* 122 S. Ct. at 1736 (plurality opinion) (citing *Pap's A.M.,* 529 U.S. at 298); *see also id.* at 1742-44 (Kennedy, J., concurring). Thus, the County must be given the opportunity to supplement the record in this manner, and the District Court, which did not have the benefit of *Alameda Books* when it granted the County's motion for summary judgment, should consider any additional evidence in the first instance.

At trial, in keeping with *Alameda Books'* burden-shifting analysis, the District Court must determine whether the County's additional evidence "renew[s] support for a theory that justifies its ordinance." 122 S. Ct. at 1736. Stated otherwise, in light of our finding that the Adult Lounges have managed to cast direct doubt on the County's rationale for adopting Ordinance 99-18, the District Court must decide by

a preponderance of the available evidence (including whatever additional evidence the County places in the record) whether there remains credible evidence upon which the County could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments in Manatee County. The burden lies with the County in this regard. However, the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies.

3. *O'Brien's* Fourth Prong

O'Brien's fourth prong requires that any incidental restriction on alleged First Amendment freedoms be no greater than is essential to further the government's interest. *O'Brien,* 391 U.S. at 376. In *Pap's A.M.*, the Court upheld a public nudity statute that permitted erotic dancers to wear at least pasties and a G-string, holding that it satisfied this part of the *O'Brien* test. 529 U.S. at 301. The Court also upheld a similar statute in *Barnes*. 501 U.S. at 570, 587. Here, however, Manatee County went beyond the regulations at issue in *Pap's A.M.* and *Barnes*, according to which pasties and a G-string are sufficient to distinguish a state of lawful dress from unlawful nudity. Instead, the County has defined "nudity" more expansively to encompass the wearing of any clothing covering less than one-third of the buttocks or one-fourth of the female breast.[22] The County has also expressly forbidden the wearing of "G-strings, T-backs, dental floss, and thongs." In other words, the County has effectively

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[22] *See supra* note 2.

redrawn the boundary between nudity and non-nudity, thereby prohibiting erotic dancers from wearing the amount of body covering the Court found to be consistent with the First Amendment in *Pap's A.M.* and *Barnes*.

The question we face is whether the County's prohibition, which presumably impacts the expressive component of erotic dancing, is no greater than essential to further the County's interest in preventing secondary effects. In *Pap's A.M.*, the Court determined that this issue required the balancing of competing interests, and it concluded that a pasties and G-string requirement survived intermediate scrutiny because it "leaves ample capacity to convey the dancer's erotic message." 529 U.S. at 301. The Court further emphasized that:

> [E]ven if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis*.

Id; *see also id.* at 294.

Applying these considerations to Ordinance 99-18, we think it significant that the Supreme Court has emphasized that local governments "'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Id.* at 301 (*quoting Renton, 475 U.S. at 52*). Nevertheless, we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a "*de minimis*" effect on the expressive component of erotic dancing or "leaves ample

capacity to convey the dancer's erotic message." *Id.* On the contrary, because erotic dancers in Manatee County are not "free to perform wearing pasties and G-strings," *id.*, arguably, the County's prohibition could significantly impact that message.

This concern about the scope of Ordinance 99-18, although raised squarely by the Adult Lounges, has not yet been adequately addressed either by the Defendants or by the District Court. Because of the importance of this issue, we are reluctant to rule without further argument from the parties and findings by the District Court. On remand, therefore, the parties and the District Court should also consider whether Ordinance 99-18 would fail under intermediate scrutiny because it proscribes too much protected expression and fails to preserve "ample capacity to convey the dancer's erotic message." 529 U.S. at 301. *Cf. Ranch House,* 238 F.3d at 1285-86 (11th Cir. 2001) (remanding under similar circumstances with specific guidance to the District Court as to *O'Brien's* fourth prong).[23]

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[23] The County argues that *Cafe 207, Inc., v. St. Johns County,* 66 F.3d 272 (11th Cir. 1995), which affirmed and adopted the reasoning of a trial court judgment validating a similar ordinance, requires us to uphold Ordinance 99-18. *See Cafe 207, Inc., v. St. Johns County,* 856 F. Supp. 641 (M.D. Fla. 1994). However, *Cafe 207* was decided before *Pap's A.M.*, where the Supreme Court clarified for the first time that nudity ordinances must leave ample capacity for erotic dancers to convey their erotic message, and *Alameda Books*, in which Justice Kennedy's controlling opinion emphasized that secondary effects ordinances must accomplish their goal of combating secondary effects "while leaving the quantity and accessibility of speech substantially intact." 122 S. Ct. at 1742.

In sum, we hold that the District Court erred by granting summary judgment to the County as to Ordinance 99-18. We therefore reverse the court's order with respect to this ordinance as well.[24]

IV. CONCLUSION

The District Court granted summary judgment to Defendants [on all grounds with respect to both Ordinance 98-46 and Ordinance 99-18. For the foregoing reasons, we REVERSE the grant of summary judgment on the Plaintiffs' First Amendment freedom of expression claims with respect to both ordinances and REMAND the case to the District Court for further proceedings consistent with this opinion.

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[24] The Adult Lounges also contend that Ordinance 99-18 is unconstitutionally overbroad, in that it sweeps within its ambit protected speech of persons not before the Court; and unconstitutionally vague, in that it fails to adequately define its operative phrases, thus leaving persons of common intelligence to guess as to the ordinance's meaning and differ as to its application. However, since we reverse the District Court's grant of summary judgment with respect to Ordinance 99-18 on independent grounds, we need not decide these issues at this time. For the same reason, we decline to address the Adult Lounges' additional claims that Ordinance 99-18 violates the Fifth Amendment, the Contract Clause, and various provisions of Florida law.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:99-CV0-2707-T-27E

[Filed April 29, 2002]

PEEK-A-BOO LOUNGE OF BRADENTON, INC., a Florida Corporation, and M.S. Enterprises, Inc., a Florida Corporation,
Plaintiffs,

v.

MANATEE COUNTY, FLORIDA, a Political Subdivision of the State of Florida,
Defendants.

FINAL SUMMARY JUDGMENT

DEFENDANT MANATEE COUNTY having moved the court for a summary judgment, and it appearing to the court that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment as a matter of law, it is

ORDERED AND ADJUDGED, that judgment is hereby granted in favor of Defendant Manatee County against

Plaintiffs Peek-A-Boo Lounge Of Bradenton, Inc., and M.S. Enterprises, Inc.; that these Plaintiffs take nothing, and that the complaint is hereby dismissed with prejudice. Defendant Manatee County recovers from the Plaintiffs Peek-A-Boo Lounge of Bradenton, Inc., and M.S. Enterprises, Inc., its costs in this action.

This is the 26th day of April, 2002.

/s/_____
James D. Whittemore
U.S. District Court Judge
Middle District of Florida

cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:99-CV-2707-T-27EAJ

[Filed March 28, 2002]

PEEK-A BOO LOUNGE OF BRADENTON, INC., a Florida Corporation, and M.S. ENTERTAINMENT, INC., a Florida corporation,
Plaintiffs,

vs.

MANATEE COUNTY, FLORIDA, a political subdivision of the State of Florida
Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on to be considered on Defendant's Motion for Summary Judgment (Dkt. 28). The Court having reviewed said motion and being otherwise fully advised in the premises, finds as follows:

I. Introduction

This case involves Plaintiffs' challenges to Manatee County's ("the County") enforcement of two county ordinances dealing with adult dancing establishments and public nudity. Plaintiffs, two adult entertainment businesses, filed an eleven count Complaint against the County seeking a declaration that Manatee County Ordinances No. 98-46 and 99-18, are unconstitutional, requesting that the County be enjoined from enforcing the ordinances and demanding a trial by jury. (Dkt. 1). The County has moved for entry of summary judgment as to each count alleged in the Complaint (Dkt. 28) and has moved to strike Plaintiffs' jury trial demand (Dkt. 53).

II. Factual Background

Ordinance 98-46[1] is a land use zoning regulation, adopted

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[1] Ordinance 98-46 provides in pertinent part:
Section 3. Addition to Adult Entertainment Code. Section 2-2.5-59of the Manatee code is hereby amended by adding the following subsections (g) through (o):
(g) All adult dancing establishment premises shall have an entrance room or lobby, i.e., the room which is entered from the outside, and sanitary facilities as set forth in subsection 2-2.5-56(f). The entrance room or lobby may be as large or as small as the licensee chooses.
(h) All other rooms in adult dance establishment premises must either:
(1) be not less than one thousand square feet in area; or
(2) be clearly marked in letters not less than two inches in height "No Customers or Patrons Allowed."
(i) Except for sanitary facilities, no doorway or entranceway within any promises shall be locked at anytime a customer is anywhere within the premises or at anytime the premises are open to the

as an amendment to Manatee County's adult entertainment code. The amendments in Ordinance 98-46 provide for specific physical requirements for premises used as adult dancing establishments. (Dkt. 1, Ex. A). Prior to enacting Ordinance 98-46, the Manatee County Board of County Commissioners (the "board") held a public hearing on the ordinance and evidence in support of and in opposition to the ordinance was submitted. After hearing comments by the public, including Plaintiffs' counsel, the board voted

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public unless customers or patrons are prohibited at all times from going into the rooms or areas behind such doorways or entrance ways and provided such doors are marked as set forth in paragraph (h)(2) above.

(j) At least one doorway into or out of the adult dancing establishment premises shall be unlocked at anytime a customer is anywhere within an adult dancing establishment premises or at anytime the premises are open to the public.

(k) All rooms open to the public in any adult dancing establishment premises shall be lighted such that the light intensity at every point thirty inches above the floor is not less than one-half footcandle.

(l) The Sheriff shall have access to all rooms at all times any adult dancing establishment premises are open to the public. Premises are irrebuttably presumed to be open at any time a customer is on the premises. This access shall be for inspection purposes only.

(m) No room other than a sanitary facility or room marked as set forth in (h)(2) shall, have any dividers or partitions or any other thing in excess of three feet in height which blocks the view of any portion of the room.

(n) Private rooms are prohibited within the adult dancing establishment premises.

(o) No room within the premises shall have its doorway or threshold blocked or obscured by doors, curtains, drapes or any other obstruction unless the room is (1) a sanitary facility, (2) the room is an adult motion picture theater in which movies are shown on a screen, or (3) a room marked as set forth in paragraph (h)(2), hereinabove.

unanimously for its approval on November 24, 1998. (Dkt. 30, Ex. 4).

Ordinance 99-18[2] is known as the Manatee County Public Nudity Ordinance. (Dkt. 1, Ex. D). Generally, Ordinance 99-18 prohibits nudity in public places with certain exceptions and defines nudity in detail. (Dkt. 1, Ex. D). The ordinance is not directed at a specific individual or business. (Dkt. 30, Ex. 13). The Manatee County Planning Commission recommended to the Manatee County Board of County Commissioners that the ordinance be enacted with the proviso that it would not apply to duly licensed adult entertainment establishments. (Dkt. 30, Exs. 4,6). The board held two public hearings on the ordinance, at which Plaintiffs' counsel appeared, spoke on Plaintiffs' behalf and submitted documents opposing the enactment of Ordinance 99-18. (Dkt. 30, Exs. 4, 5, 6, 10, 11). Evidence was submitted in support of and in opposition to the ordinance. The board approved Ordinance 99-18 on March 23, 1999, without an exemption for duly licenced establishments. (Dkt. 1, Ex. E). The effective date of the ordinance was January 1, 2000. (Dkt. 1, Ex. E):

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[2] Ordinance 99-18 provides in pertinent part:
Section 4. NUDITY PROHIBITED IN PUBLIC PLACES: It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another Person to appear, Nude in a Public Place or in any other place which is readily visible to the public, except as provided in Section 5. It shall also be unlawful for any Person or Entity maintaining, owning, or operating any Public Place establishment to encourage, suffer, or allow any Person to appear Nude in such Public Place, except as provided, in Section 5.

III. Summary Judgment Standards

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Fed. R. Civ. P. 56. The Court must view all evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997). Judgment in favor of a party is proper where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party on the issue before the Court. Fed. R. Civ. P. 56.

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Plaintiffs' evidence must be significantly probative to support their claims. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248-49 (1986).

IV. Discussion

A. Counts I and II: Predicate for Defendant's Adoption of Ordinances 98-46 and 99-18

In Counts I and II of the Complaint, Plaintiffs contend that Ordinances 98-46 and 99-18 violate the First, Fifth and

Fourteenth Amendments to the United States Constitution as there was an improper predicate for the adoption of the ordinances. Government regulations that restrict protected expression based on its content are subject to strict scrutiny. City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Artistic Entertainment, Inc. v. City of Warner Robins, 223 F.3d 1306 (11th Cir. 2000). If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, however, the regulation need only satisfy intermediate scrutiny. United States v. O'Brien, 391 U.S. 367 (1968). Regulations that target undesirable secondary effects of protected expression are deemed content-neutral and are subject to an intermediate level of scrutiny. Id.

1. Intermediate Scrutiny Analysis

Ordinances No. 98-46 and 99-18 are both content neutral. Ordinance 98-46 is content neutral as it does not operate to suppress the expressive content of dancing in adult dance establishments. Rather, it places restrictions solely on the premises where adult dance entertainment maybe provided. See Lady J. Lingerie, Inc, v. City of Jacksonville, 176 F.3d 1358, 1363-1364 (11th Cir. 1999), *cert. denied,* 529 U.S. 1053 (2000). Ordinance 99-18 is also content neutral as it bans all public nudity without regard to whether the nudity is accompanied by an erotic message. Pap's, 529 U.S. at 290. As the Supreme Court has observed, "Being in a state of nudity is not an inherently expressive condition." Pap's, 529 U.S. at 289. Accordingly, the two ordinances are subject to intermediate scrutiny analysis.

2. Application of United States v. O'Brien, 391 U.S. 367 (1968)

Plaintiffs contend that the ordinances were enacted without a proper predicate as the County did not have substantial competent evidence to support applying the ordinances to them and that the ordinances do not bear a reasonable relationship to the County's exercise of its police powers. The parties agree that the question of whether Ordinances 98-46 and 99-18 were enacted without a proper predicate is analyzed under the four part test set forth by the Supreme Court in O'Brien. The O'Brien Court held that:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

a. Manatee County's Exercise of Police Powers

It is within a county's police power to protect public health, safety and morality and to enact legislation proscribing public indecency. Pap's, 529 U.S. at 296; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567-569 (1991). Ordinances 99-18 and 98-46 concern matters of public health, safety and public indecency. As such, the ordinances are within the county's proper exercise of its police powers. See Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641, 644 (M.D. Fla.

1994), *aff'd,* 66 F.3d 272 (11th Cir. 1995), *cert. denied,* 517 U.S. 1156 (1996).

b. Substantial Governmental Interests

Prevention of adverse secondary effects caused by adult entertainment establishments, such as increased crime and neighborhood blight, constitutes a substantial governmental interest. Pap's, 529 U.S. at 294-297; Lady J. Lingerie, Inc., 176 F.3d at 1361. The government must, however, make a minimal evidentiary showing that the purpose in enacting the legislation was a concern over secondary effects.[3] Ranch House, Inc. v. Amerson, 238 F.3d 1273 (11th Cir. 2001). In "terms of demonstrating that secondary effects pose a threat, the [Defendant] need not "'conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'" Pap's, 529 U.S. at 295; Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51-52 (1986). However, the government may not rely on remote, foreign studies when current, empirical data concerning the municipality at issue exists. Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Georgia, 242 F.3d 976, 985 (11th Cir. 2001).

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[3] The Court notes that the evidence of secondary effects may have been created after the governmental legislation was enacted. The government is not required to "have before it, at the time of adoption, evidence supporting the constitutionality of the action taken." Phillips v. Borough of Keyport, 107 F.3d 164, 178 (3d Cir.), *cert. denied,* 522 U.S. 932 (1997). Instead, the government must present a "factual basis for [its] legislative judgment...in court when that judgment is challenged." Id.

Here, the County asserts that Ordinances 99-18 and 98-46 were enacted to combat the harmful secondary effects associated with nude dancing. (Dkt. 28). The County has submitted two large volumes of documents in support of its arguments. (Dkt. 30). The documents represent the County's records which were compiled during the board's proposal and deliberations of Ordinances 98-46 and 99-18. Among the evidence is a report entitled Evidence of Secondary Adverse Effects of Sexually Oriented Businesses which was prepared by The Florida Family Association, Inc. of Tampa, Florida. (Dkt. 30, Ex. 9). The report includes a transcript of testimony by a sergeant from the Pinellas County Sheriff's Office concerning his first-hand observations of the proliferation of prostitution, sexual contact and lewd acts that take place in nude dancing establishments in Pinellas County. (Dkt. 30, Ex. 9, Ex. A). Additionally, the report includes testimony from the Director of Communicable Diseases of the Pinellas County Health Department that communicable diseases are transmitted by unprotected sexual activity that takes place in nude dancing establishments. (Dkt. 30, Ex. 9, Ex. A). Also included in the report are studies from foreign jurisdictions including, Oklahoma (Dkt. 30, Ex. 9, Exs. B and H), Texas (Dkt. 30, Ex. 9, Ex. J, K, M and O), Arizona (Dkt. 30, Ex. 9, Ex. L), Ohio (Dkt. 30, Ex. 9, Exs. B and H), Indiana (Dkt. 30, Ex. 9, Ex. N) and Washington (Dkt. 30, Ex. 9, Ex. P), which address the secondary effects caused by nude dancing establishments.

At the public hearings concerning the ordinances, Plaintiffs' counsel presented evidence in opposition to the ordinances including a chapter from a book entitled Handbook

of Human Sexuality[4] which discusses the effect pornography has on social behavior. (Dkt. 30, Ex. 5). Therein, the author wrote that although it is difficult to determine the relationship between behavior and pornography, studies in Denmark have shown that exposure to "hard-core" pornography resulted in a decrease in crimes of a sexual nature. Id. at 257-58.

At the hearings, Plaintiffs also submitted their Appendix in Support of Peek-A-Boo Lounge and Temptations II's Opposition to Proposed Manatee County Public Nudity Ordinance No. 98-51 (Dkt. 30, Exs. 10, 11). Those documents include charts that purportedly reflect an increase in property values for property located near the Plaintiffs' businesses. The charts provide no information concerning the identity of the sample properties or their proximity to Plaintiffs' businesses. (Dkt. 30, Ex. 10, Tabs M and N; Ex. 11, Tabs K-M). The documents also include crime incident lists from the Plaintiffs' businesses and surrounding areas. (Dkt. 30, Ex. 10, Tabs Q-S). The incident reports show that crimes including criminal mischief, robbery, battery and assault have taken place at the Plaintiffs' businesses and in the purportedly surrounding areas throughout 1997 and 1998.

Both parties presented as evidence at the hearings numerous letters in support of the ordinances (Dkt. 30, Ex. 7, 8, 14, 18,19) and in opposition to the ordinances (Dkt. 30, Ex. 7, I 1, 12, 14, 17).

Considering the evidence presented to the Board at the time it enacted the ordinances, the Court finds that the County

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[4] Robert Athanasiou, *Pornography: A Review of Research, in* HANDBOOK OF HUMAN SEXUALITY, (Benjamin B. Wolman et al. eds., 1993).

has more than met its burden of providing minimal evidence that its interests in ameliorating the secondary effects of drug and alcohol abuse, prostitution, illicit and lewd public behavior, crime and sexually transmitted diseases were a motivating factor in enacting the ordinances. These interests are legitimate and substantial governmental interests as described in Pap's and Renton. The Court also notes that ordinances prohibiting public nudity were expressly upheld by the Supreme Court in Pap's and Barnes. Further, the County is permitted to rely on studies from neighboring areas such as Pinellas County as well as foreign studies. No evidence showed that these studies were not relevant to Manatee County.

Manatee County must merely produce some evidence justifying the adoption of the ordinances. The evidence concerning secondary effects experienced by Pinellas County, an area in close proximity to Manatee County, was relevant to Manatee County's circumstances. Flanigan's Enterprises, Inc., 242 F.3d at 985-86 (stating, "In order to meet their burden under this element, the Defendants must have 'some factual basis for the claim that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity' and other undesirable community conditions" and that "Our own cases demonstrate that we require some reasonable justification for legislation"). Accordingly, the record supports a finding that the County's purposes in enacting the ordinances was a concern over secondary effects on conditions in Manatee County which justified adoption of the ordinances.

The preceding factual analysis by the Court is a permissible and required exercise. As the Eleventh Circuit has stated, the analysis of the constitutionality of ordinances depends on local conditions and may "appear[] to result in

constitutional fact finding. . . However, we have no choice; we are bound by the decisions of the Supreme Court and the law of our circuit." Flanigan's, 242 F.3d at 987.

c. Relationship of Governmental Interest to the Suppression of Free Speech

To pass constitutional scrutiny, Manatee County's asserted interests in combating the negative secondary effects associated with adult dancing establishments and public nudity must be unrelated to the suppression of any erotic message conveyed by nude dancing and public nudity. See Pap's, 529 U.S. at 290. Ordinance 98-46 operates to place restrictions on the premises in which dancers at adult businesses express themselves but does not prevent, restrict or suppress the artistic expression itself. *See id.* at 292. Accordingly, the Court concludes that Ordinance 98-46 is unrelated to the suppression of free speech.

Additionally, Ordinance 99-18 is, on its face, a general ban on public nudity. As such, it regulates conduct alone, as did the ordinance upheld by the Supreme Court in Pap's. See Pap's, 529 U.S. at 290. The Court finds that the County's interests are unrelated to the suppression of the content of free speech and the erotic message conveyed by nude dancing and public nudity. Accordingly, the "government generally has a freer hand in restricting expressive conduct," Texas v. Johnson, 491 U.S. 397, 406 (1989).

d. The Ordinances Must be Narrowly Tailored

An ordinance is narrowly tailored when it is "not substantially broader than necessary to achieve the government's interest." Lady J. Lingerie, 176 F.3d at 1365 (quoting Ward v. Rock Against Racism, 491 U.S. 781,800

(1989)). Ordinance 98-46 amended Manatee County's adult dancing entertainment code. The amendments in Ordinance 98-46 set forth physical restrictions on premises of adult establishments in which nude dancing may take place. The ordinance applies to all adult dancing establishments, including lingerie and modeling studios, tanning salons and businesses that provide private consultative services where body-parts are displayed. (Dkt. 1, Ex. A). An examination of the ordinance leads the Court to the conclude that its provisions are narrowly tailored to achieve the County's stated interests. The ordinance regulates only the manner in which the premises are designed and operated. There is no conceivable impact on the expressive element of nude dancing.

The ordinance also provides that the rooms in the adult dance establishments, other than the entrance, lobby and sanitary facilities, must either "be not less than one thousand square feet in area" or be marked in letters two inches in height or larger "No Customers or Patrons Allowed." (Dkt. 1, Ex. A, Section 3(h)). An identical provision was upheld by the Eleventh Circuit as narrowly tailored as the "regulation leaves open reasonable alternative avenues of expression." Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1365 (11th Cir, 1999). Similarly, the Court finds that these provisions in Ordinance 98-46 are narrowly tailored.

Ordinance 98-46 includes several provisions requiring that the doors be unlocked when customers are on the premises, prohibiting dividers, partitions or obstructions taller than three feet in height, prohibiting the obstruction of any doorway and setting minimal lighting for rooms open to the

public.[5] (Dkt. 1, Ex. A, Section 3((i)(j)(m)(n)(o)). These provisions advance the County's interests in promoting the safety and health of its residents. The provisions also advance the County's interests in preventing the secondary effects of transmitting sexually transmitted diseases, prostitution, drug use and abuse and lewd acts as the evidence supporting the ordinance[6] indicates that these Secondary effects are caused by activities in adult dancing establishments that are shielded or hidden from view. These restrictions are narrowly tailored in that the dancers remain free to express themselves and reasonably alternative avenues of expression are open to them.

Adult dancing establishments are also prohibited from having "private rooms" under the provisions of the ordinance. (Dkt. 1, Ex. A, Section 3(n)). The ordinance does not define "private rooms." "Private rooms" could include a room closed to anyone other than a dancer and customer, but it could also include a secluded area, a room for an individual person, rooms not open to the public, and/or a room open to only a few people. See WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1071 (3d ed. 1996). Private rooms could also include a business office or a room for alcohol or beverage storage. This provision in Ordinance 98-46 cannot be said to be narrowly tailored to advance the County's interests as it is vague and substantially broader than

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[5] These provisions do not apply to sanitary facilities or rooms that are not open to customers of the businesses. (Dkt. 1, Ex. A, Section 3).

[6] (Dkt. 30, Ex. 9).

necessary to achieve the County's interests. This provision of Ordinance 98-46 is accordingly stricken.[7]

Ordinance 98-46 also provides in Section 3(1) for inspection of adult dancing establishments by the sheriff who shall have access to all rooms only during times when the businesses are open to the public. This provision advances the County's interest in ensuring the safety of customers and employees at the businesses. It does not authorize a search of the premises. Rather, it documents the authority the sheriff already has to enter premises that are open to the public. This regulation does not hinder or restrict the content of the dancer's expression and allows them reasonable avenues to express themselves. Accordingly, the Court finds that this provision is narrowly tailored.

Ordinance 99-18 is a regulation of general application that prohibits public nudity. The ordinance requires only minimal covering in public and includes exemptions for conveyance or

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[7] Ordinance 98-46 includes a savings clause that expressly provides:

> Section 4. Severability. It is the intention of the Board of County Commissioners that all provisions and portions of this Ordinance are severable and if any provision or portion of this Ordinance is declared by any court of competent jurisdiction to be void, unconstitutional or unenforceable, that all remaining provisions and portions of this Ordinance shall remain in full force and effect.

As such, the remaining provisions of the ordinance may remain in full force and effect in the absence of the violative provision in Ordinance 98-46, Section 3(n).

communication of a genuine message or public expression.[8] The standards are precise and objective as required by Lady J. Lingerie, Inc.,176 F.3d at 1362. Ordinance 99-18 specifically describes the body-parts that must be clothed by a fully opaque covering using measurements and precise descriptions. See (Dkt. 1, Ex. D). Ordinances wholly prohibiting public nudity have been upheld by the Supreme Court in Pap's and Barens. Further, any incidental restriction Ordinance 99-18 places on a person's First Amendment freedoms is no greater than is essential to further the County's interests in advancing the health and safety of its residents and in preventing the secondary effects caused by public nudity.

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[8] Ordinance 99-18 includes the following exemptions:

Section 5. EXEMPTIONS: The prohibitions of Section 4 of this ordinance shall not apply:

(a) When a Person appears Nude in a Place Provided Or Set Apart For Nudity provided (i) such Person is Nude for the sole purpose of performing legal function(s) that is (are) customarily intended to be performed within such Place Provided Or Set Apart For Nudity and (ii) such Person is not Nude for the purpose of obtaining money or other financial gain for such Person or for another person or Entity, or;

(b) When the conduct of being Nude cannot legally be prohibited by this ordinance (i) because it constitutes a part of a bona fide live communication, demonstration, or performance by a Person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a guise or pretense utilized to exploit nudity for profit or commercial gain and as such its protected by the United States or Florida Constitution or (ii) because it is otherwise protected by the United States or Florida Constitution.

(c) When a mother bears her breast for the purpose of nursing a child under the age of two years old.

In consideration of the foregoing, the Court finds that Ordinances 98-46 and 99-18 satisfy the O'Brien four-part test and pass constitutional scrutiny facially and as applied to Plaintiffs. The Court grants the County's motion for summary judgment as to Counts I and II, except that Section 3(n) of Ordinance 98-46 concerning "private rooms" is stricken.

B. Count III: Warrantless Search Permitted by Ordinance 98-46

In Count III of the Complaint, Plaintiffs allege that Section 3(1) of Ordinance 98-46 violates the Fourth Amendment to the United States Constitution. The County contends that it is entitled to summary judgment as to Count III on the grounds that adult entertainment taking place in commercial establishments is "closely regulated" as described in New York v. Burger, 482 U.S. 691 (1987) and that as such, Plaintiffs have no reasonable expectation of privacy that would require a warrant.

In Burger, the Supreme Court stated that although the Fourth Amendment's prohibition on unreasonable searches is applicable to commercial premises, an expectation of privacy in commercial premises is different from and less than a similar expectation in an individual's home. 482 U.S. at 699-700. The Court further explained that commercial property utilized in "closely regulated" industries have such a "long tradition of close government supervision" that the proprietor has no reasonable expectation of privacy over the stock of the property. Id. (Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978)). The "closely regulated" industry doctrine is defined by "'the pervasiveness and regularity of the [governmental] regulation' and the effect of such regulation upon an owner's expectation of privacy." Burger, 482 U.S. at 701 (quoting Donovan v. Dewey, 452 U.S. 594, 600, 601 (1981)).

The Eleventh Circuit held in Crosby v. Paulk, 187 F.3d 1339 (11th Cir. 1999) that a warrantless search of a pervasively regulated business is reasonable when: (1) a substantial government interest informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspection is necessary to further the regulatory Scheme; and (3) the inspection program provides a constitutionally adequate substitute for a warrant by indicating the terms of the certainty and regularity of its application. The Crosby court concluded that a warrantless search of nightclubs was not a violation of the Fourth Amendment when defendants established that the liquor industry was already subject to close supervision and inspection. Id.

Here, the adult entertainment industry in Manatee County has been and remains the subject of pervasive regulation and legislation. This regulatory scheme has diminished any expectations of privacy, since an adult dancing ordinance known as the Manatee County Adult Entertainment Code existed prior to the amendments in Ordinance 98-46.[9] Additionally, the County has substantial interests that are advanced by the regulatory scheme in Ordinance 98-46, as the ordinance advances the County's interests in preventing the secondary effects caused by adult dancing establishments and ensures the health and safety of its residents. The warrantless inspections are necessary to advancing the County's interest as the unannounced, surprise inspections by the sheriff are essential to enforcing the ordinance and preventing the secondary effects caused by adult dancing businesses. Further, the ordinance limits inspections by the sheriff to times during which the businesses are open to the public. As such, under

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[9] See also (Dkt. 1, ¶ 32a-j) (listing other statutes and ordinances that regulate Plaintiffs' businesses).

Crosby, Plaintiffs have no reasonable expectation of privacy that would require a warrant prior to any inspection of their commercial property. Summary judgment is granted to the County as to Count III.

C. Counts IV, V, VI and VII of the Complaint

Plaintiffs also asserted claims in the Complaint that Ordinance 98-46 violates their Fourteenth Amendment right to equal protection (Count IV), that Ordinance 99-18 is unconstitutionally vague (Count V), that Ordinances 98-46 and 99-18 are unconstitutionally overbroad (Count VI) and that the ordinances violate their Fifth and Fourteenth Amendment right to due process (Count VII). Plaintiffs and Defendant agree that these arguments are interrelated and subsumed within their arguments concerning whether a proper predicate exists for the enactment of the ordinances.

With respect to Plaintiffs' arguments concerning Counts V and VI, the Court has reviewed the ordinances and finds that Ordinance 99-18 is not unconstitutionally vague or overly broad. Likewise, Ordinance 98-46 is not unconstitutionally overly broad except for the provision prohibiting private rooms, ordinances with as much and arguably less specificity have been determined not to be unconstitutionally vague or overbroad by the Eleventh Circuit in Artistic Entertainment, Inc. v. City of Warner Robins, 223 F.3d 1306 (11th Cir. 2000) or Fillingim v. Boone, 835 F.2d 1389 (11th Cir. 1988). Ordinance 99-18 is sufficiently specific to give Plaintiffs notice of the conduct proscribed therein and Ordinances 99-18 and 96-46 are narrowly tailored to protect the health, safety and welfare of Manatee County residents. Accordingly, except for the provision in Ordinance 98-46 prohibiting private rooms, the Court finds that the ordinances are not unconstitutionally vague or overly broad.

As to Counts IV, VII and VIII,[10] Plaintiffs contend that Ordinances 98-46 and 99-18 violate their Fifth and Fourteenth Amendment rights, their rights to equal protection and the Florida Constitution on the grounds that the County has not shown that there is a public necessity for the ordinances, the ordinances do not advance any legitimate governmental interest and Ordinance 98-46 imposes structural requirements upon adult dancing establishments without a legitimate governmental purpose. In the Court's discussion of Counts I and II, these contentions were addressed. Ordinances 99-18 and 98-46 were enacted to ameliorate the adverse secondary effects caused by public nudity and adult dancing establishments. These interests are legitimate and substantial, supported by the record and the ordinances are narrowly tailored both facially and as applied to Plaintiffs. Summary judgment is granted as to Counts IV, VII and VIII concerning Ordinances 99-18 and 98-46.

D. Count IX: Whether Ordinances Impair Plaintiff's Obligation of Contract

In Count IX, Plaintiffs contend that Ordinances 98-46 and 99-18 impair their obligation of contract as they previously entered into settlement agreements[11] with the County and the ordinances impair or violate the agreements entered into by the parties. The County contends that it is entitled to summary

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[10] Although Count VIII is labeled as a regulatory takings claim in the Complaint, Plaintiffs clarify that their argument with respect to this count concerns only the alleged lack of a legitimate governmental interest in advancing the ordinances. (Dkt. 33, pgs. 13-14).

[11] The settlement agreements are included in the record in Dkt 13, Exhibits A and B.

judgment as to Count IX because it never agreed to forgo exercising its police powers to regulate the health and safety of its residents.

The United States Constitution provides that "no state shall ... pass any Law impairing the Obligation of Contracts." U.S. Const. Art. I, § cl. 1. In evaluating a claim that a law impairs the obligation of contracts, courts must determine whether the law operates as a substantial impairment of a contractual relationship and if so, whether the impairment is necessary to meet an important governmental interest. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); Flanigan's Enterprises, Inc. v. Fulton County, Georgia, 242 F.3d 976 (11th Cir. 2001). However, "the Contract Clause does not operate to obliterate the police power of the States." Spannaus, 438 U.S. 234, 244. The police power is an "exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." Id.

Here the parties' settlement agreements provide that the parties agreed to settle their lawsuits in District Court case numbers 8:88-CV-1330-T-15C and 8:88-CV-1824-T-15A and that Manatee County agreed to the entry of a permanent injunction, enjoining it from enforcing an ordinance against Plaintiffs. Neither party can suggest that the settlement agreement or the ordinance to which it was directed precluded the County from enacting subsequent legislation that it deemed necessary to protect the safety and health of its residents. See Spannaus. As the Court has previously determined, Ordinances 98-46 and 99-18 advance the County's substantial interests in preventing the secondary effects caused by adult dancing establishments and public nudity and protects the safety and health of the residents of

Manatee County. As such, the Court finds that even if the ordinances operate as a substantial impairment of the parties' contractual relationship, the impairment is necessary to advance the County's substantial interests. Summary judgment is granted to the County as to Count IX.

E. Count X: Ordinance 99-18's Preemption of State Law

In Count X, Plaintiffs contend that Ordinance 99-18 is preempted by §§ 800.03 and 847.07, *Florida Statutes*. Florida courts have considered whether municipal ordinances are preempted by §§ 800.03 and 847.07. In Shetler v. State, 681 So.2d 730 (Fla.2d DCA 1996), the court held that a county ordinance regulating public nudity was not preempted by § 800.03 and that nothing in the statutes or ordinance in question indicated that they could not coexist. Additionally, in Leigh v. State, 298 So.2d 215 (Fla. 1st DCA 1974), the court held that § 847.07 preempted any municipal ordinances that prohibited persons under the age of seventeen from being exposed to harmful motion pictures, exhibitions, shows, presentations and the like. Neither the municipal ordinance at issue in Leigh nor Ordinance 99-18 at issue here involves the matters preempted in § 847.07. Thus, those statutes do not preempt Ordinance 99-18 and the Court grants the County's motion for summary judgment as to Count X.

Finally, Plaintiffs contend that procedural irregularities in the enactment of Ordinances 99-18 and 98-46 constitute a violation § 164.3194, *Florida Statutes*. Plaintiffs contend that the County failed to comply with the provisions of § 164.3194(2) in that it did not refer the ordinances to either the local planning agency or to a separate land development commission for review. The Complaint does not include allegations concerning these purported violations of

§ 164.3194. The Court declines to consider issues not raised in the Complaint. Accordingly, it is

ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Judgment (Dkt.28) is **GRANTED**, except that Section 3(n) of Ordinance 98-46 is **STRICKEN** as it is not narrowly tailored to advance the County's interests and is unconstitutionally over-broad.

2. The Clerk is directed to close this ease and deny all pending motions as moot.

DONE AND ORDERED in chambers this 28th day of March, 2002.

/s/_____
JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record

APPENDIX E

ORDINANCE NO. 99-18

ADOPTED: 03/23/99
FILED W/ STATE: 04/01/99
EFFECTIVE: 01/01/2000

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MANATEE, STATE OF FLORIDA, TO BE KNOWN AS THE MANATEE COUNTY PUBLIC NUDITY ORDINANCE; STATING INTENT OF THE ORDINANCE; PROVIDING THE DEFINITION OF NUDITY AS PROHIBITED BY THIS ORDINANCE AND PROVIDING OTHER DEFINITIONS; PROVIDING LEGISLATIVE FINDINGS; PROHIBITING NUDITY IN CERTAIN PUBLIC PLACES; PROVIDING FOR ENFORCEMENT AND PENALTIES FOR THE VIOLATION OF THIS ORDINANCE; PROVIDING FOR INJUNCTIVE RELIEF; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MANATEE COUNTY, FLORIDA:

WHEREAS, the Board desires to protect and preserve the unique character of Manatee County as a destination for families, tourists, and businesses; and,

WHEREAS, the Board wishes to regulate nudity and sexual conduct in and around business establishments in that such activity begets undesirable behavior; and,

WHEREAS, the Board finds and determines that there are allegations from citizens about increasing incidents of nudity in Public Places; and,

WHEREAS, the Board finds and determines that Persons who choose to appear Nude in Public Places are engaging in conduct which often serves to impose their nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and,

WHEREAS, appearing Nude in Public Places was a criminal offense at common law and was considered an act *malum en se;* and,

WHEREAS, the Board finds and determines that appearing Nude in Public Places still generates societal disapproval; and,

WHEREAS, the Board finds and determines that the mere appearance of Nude Persons in Public Places generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, and encourages degradation of women and other activities which break down family structures; and,

WHEREAS, the Board finds and determines that without regulation, public nudity constitutes harmful conduct and occurs in a manner which is incompatible with normal community activity; and,

WHEREAS, the Board recognizes that there may be instances wherein appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by United States or Florida constitutional provisions; and,

WHEREAS, a requirement that dancers don opaque covering sufficient to cover the Buttocks and the Breasts as such portions of the human anatomy are defined in this ordinance does not deprive the dance of whatever erotic message, if any, it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation on the message; and,

WHEREAS, it is the intent of the Board to protect and preserve the public health, safety, welfare, and morals of Manatee County by restricting, to the full extent allowed by the United States and Florida constitutions, the act of being Nude to places which are not frequented by the public and places-which are not readily visible to the public; and,

WHEREAS, the Board finds and determines that the average person applying contemporary Manatee County community standards would find that the public nudity prohibited by this ordinance, if allowed, when taken as a whole (i) appeals to the prurient interests and (ii) lacks serious literary, artistic, political, and scientific value; and,

WHEREAS, Manatee County is essentially a rural - suburban community which desires to continue as a community that is known for traditional wholesome public recreation activities and its abundant natural resources, and public nudity is inconsistent with current community standards, characteristics and goals; and

WHEREAS, as has occurred in other counties in Florida, Public Nudity in Manatee County may encourage commercial Entities and other Persons to advertise outside of Manatee County and the State of Florida by billboard, radio, print, and other media the availability of nudity, in Public Places within Manatee County and thus encourages the influx into Manatee County of Persons seeking (i) to observe and/or participate in such nudity and (ii) to participate in the disorderly, harmful, and illegal conduct that is associated therewith; and,

WHEREAS, the Board finds and determines that the prohibitions contained herein are the most reasonable and minimal restrictions required so as to regulate conduct which is adverse to public order, morality, and decency within Manatee County, when such conduct takes place at locations where the public is present or is likely to be present, or where such conduct would be readily visible to the public; and,

WHEREAS, the Board is aware that States may regulate the conduct of appearing Nude in Public Places; see *Michael Barnes v. GlenTheatre, Inc.*, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991); and,

WHEREAS, the Board is not hereby prohibiting nudity in truly private places or prohibiting nudity which is protected by the United States or Florida constitutional provisions guaranteeing freedom of expression; and,

WHEREAS, the Board is of the opinion that this ordinance is a general ordinance regulating conduct and is not an ordinance that affects the use of land as contemplated by Florida Statute 125.66, the Board does not wish to get sidetracked in lengthy and expensive litigation concerning procedural matters that are not relevant to the subject matter of this ordinance and has determined to enact this ordinance

under the more conservative, expensive, and time consuming "affecting use of Land" procedure as well as under the general procedure for ordinances that regulate conduct; and,

WHEREAS, the Board finds and determines that this ordinance is consistent with its current comprehensive plan;

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Manatee County, Florida, as follows:

Section 1. **TITLE:** This ordinance shall be known as the Manatee County Public Nudity Ordinance.

Section 2. **INTENT:** It is the intent of this ordinance to protect and preserve the health, safety, welfare, and morals of the citizens of Manatee County by prohibiting a Person from intentionally or recklessly appearing or being Nude, or causing another Person to appear or be Nude, in a Public Place and in other places which may reasonably be expected to be observed by the public within the unincorporated areas of Manatee County except:

a. When such Person appears Nude in a Place Provided or Set Apart for Nudity provided (i) such Person is Nude for the sole purpose of performing the legal functions that are customarily intended to be performed within such Place Provided Or Set Apart for Nudity and (ii) such Person is not Nude for the purpose of obtaining money or other financial gain for themselves or others; or

b. When the conduct of being Nude cannot legally be prohibited by this ordinance (i) because it constitutes a part of a bona fide live communication, demonstration, or performance by such Person wherein such nudity is

expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a guise or pretense utilized to exploit nudity for profit or commercial gain and as such is protected by the United States or Florida Constitution or (ii) because it is otherwise protected by the United States or Florida Constitution.

It is the Board's further intention to accomplish those intents and purposes expressed by the Board in the "Whereas" provisions of this ordinance, each of which are incorporated by reference into this Section 2.

Section 3. **DEFINITIONS**:

a. Breast: A portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple) and an outside area of such gland wherein such outside area is (i) reasonably compact and contiguous to the areola and (ii) contains at least the nipple and the areola and 1/4 of the outside surface area of such gland.

b. Buttocks:(For a short general description, see the last sentence of this subsection.) The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top such line being ½ inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom such line being ½ inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight

lines, one on each side of the body (the "outside lines"), which outside lines are perpendicular to the ground and to the horizontal lines described about and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the outer side of each leg. Notwithstanding the above, buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fasciae latae muscle or any of the above-described portion of the human body that is between either (i) the left inside perpendicular line and the left outside perpendicular line or (ii) the fight inside perpendicular line and fight outside perpendicular line. For the purpose of the previous sentence, the left inside perpendicular line shall be an imaginary straight line on the left side of the anus (i) that is perpendicular to the ground and to the horizontal lines described about and (ii) that is 1/3 of the distance from the anus to the left outside line, and the right inside perpendicular line shall be an imaginary straight line on the fight side of the anus (i) that is perpendicular to the ground and to the horizontal lines described above and (ii) that is 1/3 of the distance from the anus to the fight outside line. (The above description can generally be described as covering 1/3 of the buttocks centered over the cleavage for the length of the cleavage.)

c. Entity: Any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

d. Nude: Any Person insufficiently clothed in any manner so that any of the following body parts are not entirely covered with a fully opaque covering:

(1) The male or female genitals, or

(2) The male or female pubic area, or

(3) The female Breast (see the last sentence in this subsection f), or

(4) The Buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Backs, dental floss, and thongs.

Body paint, body dyes, tattoos, and similar substances shall not be considered opaque coveting. Each female Person may determine which 1/4 of her Breast surface area (see definition of Breast) contiguous to and containing the nipple and the areola is to be covered.

e. Person: Any live human aged five (5) years of age or older.

f. Places Provided Or Set Apart For Nudity: Shall mean enclosed public restrooms, enclosed functional shower and locker room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein. This term shall not be deemed to include places where being Nude is used for profit or for the promotion of business or is otherwise commercially exploited.

g. Public Place: Any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public Places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership

requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets, and meeting facilities utilized by any religious, social, fraternal or similar organization. Premises, or portions thereof such as hotel rooms, used solely as a private residence, whether permanent or temporary in nature shall not be deemed to be a Public Place.

Section 4. **NUDITY PROHIBITED IN PUBLIC PLACES:** It shall be unlawful for any Person to knowingly, intentionally, or recklessly appear, or cause another Person to appear, Nude in a Public Place or in any other place which is readily visible to the public, except as provided in Section s. It shall also be unlawful for any Person or Entity maintaining, owning, or operating any Public Place establishment to encourage, suffer, or allow any Person to appear Nude in such Public Place, except as provided in Section 5.

Section 5. **EXEMPTIONS**: The prohibitions of Section 4 of this ordinance shall not apply:

a. When a Person appears Nude in a Place Provided Or Set Apart For Nudity provided (i) such Person is Nude for the sole purpose of performing the legal function(s) that is (are) customarily intended to be performed within such Place Provided Or Set Apart For Nudity and (ii) such Person is not Nude for the purpose of obtaining money or other financial gain for such Person or for another person or Entity, or;

b. When the conduct of being Nude cannot legally be prohibited by this ordinance (i) because it constitutes a part of a bona fide live communication, demonstration, or performance by a Person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a guise or pretense utilized to exploit nudity for profit

or commercial gain and as such is protected by the United States or Florida Constitution or (ii) because it is otherwise protected by the United States or Florida Constitution.

c. When a mother bares her breast for the purpose of nursing a child under the age of two years old.

Section 6. **ENFORCEMENT AND PENALTIES**: Any Person or Entity violating any of the provisions of this ordinanc6 shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the State of Florida in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and, upon conviction, shall be punished by a free not to exceed $500 or by imprisonment in the County jail not to exceed 60 days or by both such free and imprisonment. Each incident or separate occurrence of an act that violates this ordinance shall be deemed a separate offense.

Section 7. **INJUNCTIVE RELIEF**: In addition to the procedures provided herein, Establishments which suffer or permit employees to appear in violation of this ordinance shall be subject to appropriate civil action in the court of appropriate jurisdiction for abatement.

Section 8. **TERRITORY EMBRACED**: All territory within the legal boundaries of unincorporated Manatee County shall be embraced by the provisions of this ordinance.

Section 9. **SEVERABILITY**. If any section, subsection, sentence, clause, phrase, word, or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, whether for substantive, procedural, or any other reasons, such portion shall be deemed a separate, distinct, and independent provision, and

such holding shall not affect the validity of the remaining portions of this ordinance.

Section 10. **EFFECTIVE DATE**. This ordinance shall become effective on January 1. 2000.

PASSED AND DULY ADOPTED by the Board of County Commissioners of Manatee County, Florida, this 23rd day of March, 1999.

BOARD OF COUNTY COMMISSIONERS
MANATEE COUNTY, FLORIDA

By:/s/_____
STAN E. STEPHENS
CHAIRMAN

ATTEST:
R.B. SHORT
CLERK OF THE CIRCUIT COURT

By: /s/_____

APPENDIX F

ORDINANCE NO. 98-46

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF MANATEE COUNTY, FLORIDA, AMENDING CERTAIN PROVISIONS OF: THE ADULT ENTERTAINMENT CODE, CHAPTER 2-2.5 OF THE MANATEE COUNTY CODE OF LAWS, ADDING CERTAIN SUBSECTIONS PRESCRIBING CERTAIN PHYSICAL REQUIREMENTS FOR ALL ADULT DANCING ESTABLISHMENTS; AND PROVIDING EFFECTIVE DATE.

WHEREAS, the Board of County Commissioners of Manatee County, Florida, is authorized under Chapters 125, 162, 163, 177 and 380, Florida Statutes, to enact zoning, land development and other regulations and ordinances to protect the health, safety, and welfare of the citizens of Manatee County, Florida; and

WHEREAS, Sections 163.3201, 163.3202,. 163.3204, 163.3211 and 163.3213, Florida Statutes, empower and require the Board of County Commissioners of Manatee County, Florida, to implement adopted comprehensive plans by the adoption of appropriate land development regulations and specifies the scope, content and administrative review procedures for said regulations; and

WHEREAS, Section 125.01, Florida Statutes, empowers the Board of County Commissioners of Manatee County,

Florida, to adopt ordinances and resolutions necessary for the exercise of its powers and prescribe fines and penalties for the violation of ordinances in accordance with law; and

WHEREAS, it is necessary, expedient and in the best interest of the health, safety, and welfare of the citizens of Manatee County, Florida, to regulate the operation of adult dancing establishments which includes lingerie and modeling studios, tanning salons and other enterprises which purport to offer private consultative services where specified anatomical parts are displayed located within said county;

WHEREAS, the subject of the ordinance may arguably be considered as pertaining to land uses or conduct;

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Manatee County, Florida, as follows:

Section 1. Whereas Clauses. The foregoing recitals are hereby adopted and incorporated herein by reference.

Section 2. Purpose and Intent. This Ordinance is enacted to carry out the purpose and intent of and exercise the authority set out in the Local Government Comprehensive Planning and Land Development Regulation Act, Sections 163.3161 through 163.3215, Florida Statutes, and Chapter 125, Florida Statutes, as amended.

Section 3. Addition to Adult Entertainment Code. Section 2-2.5-59 of the Manatee Code is hereby amended by adding the following subsections (g) through (o):

(g) All adult dancing establishments premises shall have an entrance room or lobby, i.e., the room which is

entered from the outside, and sanitary facilities as set forth in subsection 2-2.5-56(f). The entrance room or lobby may be as large or as small as the licensee chooses.

(h) All other rooms in adult dance establishment premises must either:

(1) be not less than one thousand square feet in area; or

(2) be clearly marked in letters not less than two inches in height "No Customers or Patrons Allowed."

(i) Except for sanitary facilities, no doorway or entranceway within any premises shall be locked at anytime a customer is anywhere within the premises or at anytime the premises are open to the public unless customers or patrons are prohibited at all times from going into the rooms or areas behind such doorways or entranceways and provided such doors are marked as set forth in paragraph (h)(2) above.

(j) At least one doorway into or out of the adult dancing establishment premises shall be unlocked at anytime a customer is anywhere within an adult dancing establishment premises or at anytime the premises are open to the public.

(k) All rooms open to the public in any adult dancing establishment premises shall be lighted such that the light intensity at every point thirty inches above the floor is not less than one-half footcandle.

(l) The Sheriff shall have access to all rooms at all times any adult dancing establishment premises are open to the public. Premises are irrebuttably presumed to be open at

any time a customer is on the premises. This access shall be for inspection purposes only.

(m) No room other than a sanitary facility or room marked as set forth in (h)(2) shall have any dividers or partitions or any other thing in excess of three feet in height which blocks the view of any portion of the room.

(n) Private rooms are prohibited within the adult dancing establishment premises.

(o) No room within the premises shall have its doorway or threshold blocked or obscured by doors, curtains, drapes or any other obstruction unless the room is (1) a sanitary facility, (2) the room is an adult motion picture theater in which movies are shown on a screen, or (3) a room marked as set forth in paragraph (h)(2), hereinabove.

Section 4. Severability. It is the intention of the Board of County Commissioners that all provisions and portions of this Ordinance are severable and if any provision or portion of this Ordinance is declared by any court of competent jurisdiction to be void, unconstitutional or unenforceable, that all remaining provisions and portions of this Ordinance shall remain in full force and effect.

Section 5. Amortization. Any adult dancing establishment lawfully existing at the time of adoption of this Ordinance 98-46 shall have until January 1, 2000, to comply with the provisions of this Ordinance 98-46.

Section.6. Effective Date. This Ordinance shall take effect immediately upon filing hereof with the Department of State.

PASSED AND DULY ADOPTED, with a quorum present and voting, by the Board of County Commissioners of Manatee County, Florida, this 24th day of November, 1998.

BOARD OF COUNTY COMMISSIONERS
MANATEE COUNTY, FLORIDA

By: /s/ _____
PATRICIA M. GLASS
CHAIRMAN

ATTEST:
R. B. SHORE
CLERK OF THE CIRCUIT COURT

By: /s/_____

APPENDIX G

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

Chapter 2-2.5

ADULT ENTERTAINMENT CODE*

Art. I. In General, §§ 2-2.5-1—2-2.5-25
Art. II. Administration, §§ 2-2.5-26—2-2.5-55
Art. III. Requirements for Licensed Premises, §§ 2-2.5.56—2-2.5-70
Art. IV. Enforcement, §§ 2-2.5-71—2-2.5-90
Art. V. Reserved, §§ 2-2.5-91—2-2.5-105
Art. VI. Advertising, §§ 2-2.5-106, 2-2.5-107

ARTICLE I. IN GENERAL

Sec. 2-2.5-1. Title.

This chapter may be known and cited as the adult entertainment code. (Ord No. 84-11, § 1.03, 7-20-84)

Sec. 2-2.5-2. Findings of fact.

Based on evidence and testimony presented at public hearings before the board of county commissioners of Manatee County, Florida, and on the findings incorporated in the City of Jacksonville, Florida, Municipal Code,

* Editor's note–Ord. No. 84-11, adopted July 20, 1984, did not specifically amend this Code; hence, inclusion as Ch. 2-2.5 hereof was at the discretion of the editor.

Chapter 150, section 150.101 and the Orange County, Florida, Municipal Code, Adult Entertainment Code, section 1A-4, the board hereby finds:

(a) The possession, display, exhibition, distribution and sale of books, magazines, motion pictures, prints, photographs, periodicals, records, novelties and devices which depict, illustrate, describe or relate to specified sexual activities is a business that exists within the county.

(b) The operating and maintaining of places:

(1) Where parts of one person are treated or encountered by rubbing, stroking, kneading or tapping by a second person, accompanied by the display or exposure of specified anatomical areas; or
(2) Presenting dancers displaying or exposing specified anatomical areas;

are businesses that exist or may exist within the county.

(c) When the activities detailed in subsections (a) and (b) are present in an area of the county other activities tend to accompany them which are illegal, immoral or unhealthful, such as prostitution, pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful materials, possession, distribution and transportation of obscene materials, sale or possession of controlled substances and violent crimes against persons and property, and these illegal, immoral or unhealthful activities tend to concentrate around and

be aggravated by the presence of the activities detailed in Subsections (a) and (b).

(d) The buildings and establishments in which these activities and business operations take place:

(1) Are conducive to and are often used for the commission of immoral, lewd, indecent or illegal acts;
(2) Are constructed, in part or in whole, of substandard materials or in disregard for the health and safety of patrons and customers.

(e) The business operations and activities detailed in subsections (a) and (b) frequently occur in commercial establishments either selling or allowing consumption of alcoholic beverages.

(f) The concurrence of the sale or consumption of alcoholic beverages together with the activities described in subsections (a) and (b) are a potential health and safety risk to those persons attending such activities.

(g) In order to preserve the public peace and good order, and to safeguard the health, safety and welfare of the community and the citizens thereof, it is necessary and advisable to regulate and restrict the sale and consumption of alcoholic beverages where the business operations and activities described in subsections (a) and (b) occur.

(h) Physical contact within commercial establishments between persons exhibiting specified anatomical areas and patrons or spectators poses a threat to the

individual health of both and promotes the spread of communicable and social diseases.

(i) Advertising by an establishment that conducts activities described in subsections (a) and (b), and which suggests to a reasonable person that sexual stimulation and sexual gratification offered or provided by such an establishment is a proper subject for regulation by the county.

(j) The business operations and activities described in subsections (c) and (b) are commercial ventures, operated for the purpose of making a profit, and as such are proper subjects for regulation by the county in the interest of the health, safety, and welfare of the public. (Ord. No. 84-11, § 1.01, 7-20-84)

Sec. 2-2.5-3. Purpose.

The intent of the board in adopting this chapter is to establish reasonable and uniform regulations that will reduce the adverse effects that adult entertainment businesses have upon Manatee County, Florida, and to protect the health, safety, morals, and welfare of the citizens and inhabitants of Manatee County, Florida. (Ord. No. 84-11, § 1.02, 7-20-84)

(2)

SUPREME COURT, U.S.
FILED
MAR 15 2004
OFFICE OF THE CLERK

No. 03-1011

IN THE

Supreme Court of the United States

MANATEE COUNTY,

Petitioner,

v.

PEEK-A-BOO LOUNGE OF BRADENTON, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Eleventh Circuit held – in accordance with this Court's decision in *City of Los Angeles v. Alameda Books, Inc.* – that when there is conflicting evidence on whether a government restriction on First Amendment activities is adequately supported by an evidentiary record, summary judgment is inappropriate. The Court also reaffirmed that such an ordinance cannot survive a constitutional challenge when there is no evidence – either pre-enactment or post-enactment – to support it. The Questions Presented are:

I. WHETHER A LOCAL ORDINANCE THAT IMPOSES RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES IS VALID WHEN ABSOLUTELY NO PRE-ENACTMENT OR POST-ENACTMENT EVIDENCE WAS PRESENTED TO SUPPORT THE ASSERTED INTEREST PROPOSED BY THE GOVERNMENT AS THE REASON FOR ITS ENACTMENT.

II. WHETHER IT WAS IMPROPER FOR THE COURT OF APPEALS TO REMAND THIS CASE FOR TRIAL, TO ALLOW RESPONDENTS THE OPPORTUNITY TO CASE DOUBT ON THE EVIDENCE PRESENTED BY THE GOVERNMENT TO SUPPORT ITS CLAIM THAT ITS ORDINANCE ADVANCED A SUBSTANTIAL GOVERNMENTAL INTEREST, OR THE RELEVANCE OF THAT EVIDENCE TO THE INTEREST ASSERTED BY THE GOVERNMENT.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents' Counsel notifies the Court that Respondents Peek-A-Boo Lounge of Bradenton, Inc. and M.S. Entertainment, Inc. are each Florida for-profit corporations. Neither Respondent has any parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the Respondent corporations.

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B. Likewise, there is no conflict between the Eleventh Circuit's opinion and the opinion in *SOB, Inc.* that requires review by this Court. 13

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First Amendment i

Rule:

Fed. R. Civ. P. 65(a)(2) 13

STATEMENT OF THE CASE

There were two ordinances challenged below. The first – Ordinance 98-46 – was enacted in 1998, and amended the Manatee County Adult Entertainment Code. The amendment, described by the District Court as a "land use zoning regulation,"[1] established certain physical requirements for "adult dancing establishments."[2]

The following year, the County enacted a new ordinance – Ordinance 99-18 – that was not part of its Adult Entertainment Code. Ordinance 99-18 regulated public nudity. The ordinance prohibited nudity in public places, including the businesses of these Respondents, operators of the only two adult cabarets in the County. The Respondents sued to challenge both ordinances.

The United States District Court granted the County's Motion for Summary Judgment as to Ordinance 98-46, the zoning ordinance. Despite the fact that the County presented no pre-enactment or post-enactment evidence to support the Ordinance, the Court nonetheless said that ". . . evidence in support of and in opposition to the ordinance was submitted" during the public hearing in which Ordinance 98-46 was enacted.[3] The Court inexplicably made this statement in spite

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1. Appendix D to the Petition, at 53a.

2. An "adult dancing establishment," often referred to as an adult nightclub, is a business in which entertainers present dancing performances, in varying states of undress, for the entertainment of the patrons of the business. Ordinance 98-46 imposed requirements on adult dancing establishments for room size, lighting in customer areas, unlocked access to all customer areas and similar restrictions.

3. App. D, at 54a.

of the fact that no such evidence was ever before the County at any time. Apparently the District Court incorporated materials which were not presented during the adoption process into its consideration of Ordinance 98-46, materials that did not even exist at that time; those materials were presented a year later during the adoption process for Ordinance 99-18, an unrelated ordinance. Additionally, they were not even prepared or collected by the County, but were provided by a highly-biased private citizen, an executive officer of an organization opposed to all adult entertainment businesses.

The District Court also upheld Ordinance 99-18, and made a similar statement in regard to its enactment. The Court said – this time correctly – that during the hearing, "Evidence was submitted in support of and in opposition to the ordinance."[4] The County had presented what it claimed was adequate and relevant evidence with its Motion for Summary Judgment. The Respondents presented a significant quantity of evidence directly refuting the evidence that had been presented by the County. The Court resolved that factual dispute – as to the relevance and sufficiency of the evidence before the County when it passed Ordinance 99-18 – without allowing the parties the opportunity for an evidentiary hearing, when the evidence would have been tested for relevance and sufficiency.

The Eleventh Circuit reversed and remanded for further proceedings, including (we assume) the opportunity for the parties to examine and challenge the evidence presented by the other. As to Ordinance 98-46, the Court of Appeals correctly observed that the County had no evidence before it

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4. App. D at 55a.

at the time of enactment relevant to showing the County's asserted need for the ordinance. The Court also said that the District Court had no post-enactment evidence before it to support its conclusion that the evidence before the County was sufficient.[5] Based on the total lack of evidence, the panel concluded that the District Court's judgment finding Ordinance 98-46 constitutional was erroneous.

As to Ordinance 99-18, the Circuit Court found summary judgment inappropriate for resolving the factual dispute between the parties as to whether the County's supporting evidence was relevant to the asserted governmental interest, and whether that evidence was credible and reliable. It reversed the summary judgment upholding the ordinance.

In its opinion, the District Court made no mention of this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). However, the Circuit Court placed great reliance on that decision when it reversed the District Court.

The case comes to this Court now, on Petition by the County, "at a very early stage in this process." *Alameda Books*, 535 U.S. at 439. As to one ordinance, the Eleventh Circuit found absolutely no evidence in the record to support its enactment; as to the other, the Court found an evidentiary dispute that was not appropriate for resolution by summary judgment. There is no reason for this Court to enter the fray between these parties until there is an adequate evidentiary record *in this case* on which the trial court can base a decision.

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5. The Eleventh Circuit explained how the District Court had erroneously found sufficient evidence to support *both* ordinances. The District Court had simply treated both ordinances as a single enactment and considered the evidence presented to justify the 1999 ordinance as sufficient to support the 1998 enactment.

REASONS FOR DENYING THE PETITION

Manatee County wants this Court to intervene at this early stage of the litigation, before the District Court has the opportunity to resolve the evidentiary dispute between the parties at a trial on the merits. Respondents believe that review by this Court at this time is unnecessary and unwise. As Respondents have pointed out, this case is in the early stages of litigation. Following the filing of the Complaint and some preliminary matters, the County filed its motion for summary judgment, and attached the affidavits and evidence it believed would support each ordinance. The Respondents filed their memorandum in opposition, and attached affidavits and evidence challenging the County's presentation. The District Court ruled for the County, and the case moved on to the Court of Appeals.

Should this Court deny review at this stage, the case will go back to the trial court. At that time, as it has been directed to do by the Eleventh Circuit, the District Court will resolve the evidentiary dispute between the parties in a trial on the merits. While the case is in the District Court, that Court will apply the guidance of this Court in *Alameda Books*, and will render a final judgment in accord with that decision. In the meantime, it is far too early for this Court to review this case.

1. The interlocutory nature of the judgment below makes review in this Court both unwise and unnecessary.

For well over a century, this Court has carefully protected the use of its very limited time and resources to avoid involvement in interlocutory matters except in the most

unusual of cases. As the Court said in *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372 (1893), review by certiorari in this Court ". . . should be exercised sparingly and with great caution and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." 148 U.S. at 383. *See also* 508 U.S. 946 (1993) (Scalia, J., concurring). In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327 (1967), the Court declined to review a case by certiorari because the court of appeals had remanded the case to the district court for further proceedings.

Review in this Court is not warranted now. The Eleventh Circuit has sent this case back to the trial court, with instructions to "conduct further proceedings consistent with this opinion." At such time as the case becomes final in the District Court, one or more of the issues may have been resolved to the parties' satisfaction. A complete record will have been developed. The case will be ready for appellate review.[6] It is not ready today.

Respondents acknowledge some exceptions to the general practice that this Court does not review interlocutory proceedings. One exception is when the Court decides it is necessary to resolve a conflict among the federal circuits on an important issue of federal law, and the Court determines that early review is necessary. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945). Manatee County claims that there is a conflict among the circuits that is so

6. As Justice Stevens wrote in his dissent in *Estelle v. Gamble*, 429 U.S. 97 (1976), ". . . Likewise, if the decision of the Fifth Circuit . . . had been allowed to stand and the case had run its normal course, the litigation probably wold have come to an end without the need for review by this Court." 429 U.S. at 113 (Stevens, J. dissenting).

serious that review by this Court is urgently needed now. The County is wrong.

2. There is no conflict among the circuits on the distinction between pre-enactment and post-enactment evidence that requires this Court's intervention.

According to the County's Petition, there is a conflict among the federal circuits on both of the Questions it presents for review. The County's two Questions are: (1) "whether *pre-enactment* evidence of secondary effects is required to sustain a secondary effects ordinance;" and (2) "whether a challenge to a local government's secondary effects evidence transforms the question of legislative justification from a matter of law into an issue of triable fact."[7] While the Respondents disagree that these are actually questions to be resolved,[8] the Respondents do agree that if the decision of the Eleventh Circuit placed that circuit in conflict with other circuits, this Court *might* consider varying from its standard practice of not reviewing interlocutory decisions. But while the County claims that the very existence of a conflict creates a reason for granting the Petition, it fails to explain why review at this time is important. And a review of the "conflicts" argued by the County makes it clear that no review is necessary at this time.

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7. Petition at 11.

8. Respondents suggest that, as to the first question, the lack of both pre-enactment and post-enactment evidence makes it unnecessary for this Court to review the decision of the Eleventh Circuit as to Ordinance 98-46.

The County claims that the decision of the Eleventh Circuit is in conflict with a decision of this Court and decisions from other federal circuit courts on the issue of the need for pre-enactment evidence. According to the Petition, the Eleventh Circuit opinion is in conflict with this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The County claims that it is also in conflict with decisions from the "Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits."[9] Those decisions creating the alleged conflict are identified as: *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997) (en banc), *Chesapeake B & M v. Harford County*, 58 F.3d 1005 (4th Cir. 1995); *BGHA, LLC v. City of Universal City*, 340 F.3d 295 (5th Cir. 2003); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); and *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003).

Several of these cases need no discussion. *Alameda Books* defines the process by which a secondary effects ordinance is reviewed. But *Phillips*, *Chesapeake B & M* and *DiMa* were all decided long before *Alameda Books*. This Court has no need to review an alleged conflict with cases that were decided before this Court spoke in *Alameda Books*.[10] A review of the other decisions – *BHGA* and *Center for Fair Public Policy* – quickly reveals that there is a significant distinction between them and this case.

In *BHGA*, the City of Universal City, Texas adopted a licensing and zoning ordinance applicable to adult entertainment businesses. An adult cabaret, which would have

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9. Petition at 13.

10. Likewise, this Court's decision in *Barnes* preceded the decision in *Alameda Books*.

been forced to relocate, filed suit. The City presented the preamble to the ordinance, the minutes of the City Council meetings when the ordinance was considered and enacted, and several affidavits "of individuals directly involved in the study, development, and enactment of the Ordinance. . . ." 340 F.3d at 298. The cabaret argued that the affidavits were insufficient because they were not created until after the litigation was filed. However, the cabaret *never* challenged the substance of the affidavits. *Id.* at 399.

Amazingly, the opinion of the Fifth Circuit never mentioned *Alameda Books*, even though that case had been decided nearly two years earlier. Under an *Alameda Books* analysis, the decision of the Fifth Circuit was correct. As the plurality wrote in *Alameda Books*:

> . . . If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g., Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (plurality opinion). . . .

535 U.S. at 438-39. And as Justice Kennedy added in his concurring opinion: "If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." *Id.* at 453.

In *BHGA*, there was no need for a trial because Universal City presented limited pre-enactment and substantial post-enactment evidence with its motion for summary judgment that provided some support for its ordinance, and the cabaret *never challenged that evidence*. Without evidence before it that cast doubt on the city's evidence, the district court granted the city's motion.

In this case, there is an abundance of evidence from these Respondents that cast doubt on the pre-enactment and post-enactment evidence presented by the County to support Ordinance 99-18. The Eleventh Circuit simply found that with conflicting evidence, as both the plurality *and* Justice Kennedy wrote in *Alameda Books*, summary judgment is inappropriate and a trial on the merits is required. There is absolutely no conflict between *BHGA* and this case.

The other case cited by Manatee County as being in conflict with the opinion below is *Center for Fair Public Policy v. Maricopa County*. Again, there is no conflict that warrants the Petition in this case being granted.

Unlike the Fifth Circuit in *BHGA*, the Ninth Circuit panel did consider *Alameda Books* in its decision. Indeed, the very basis for the strong dissent by Judge Canby in the Court's 2-1 decision was his observation that the majority misread and misapplied Justice Kennedy's concurring opinion.[11] But there is a significant difference between *Center for Fair Public Policy* and this case. The instant case came to the

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11. Both the majority and the dissent in *Center for Fair Public Policy* agreed that Justice Kennedy's concurrence was the opinion of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977). They disagreed on what that concurrence said.

Eleventh Circuit following the grant of Manatee County's motion for summary judgment. *Center for Fair Public Policy* arrived at the Ninth Circuit as a final judgment.[12] In this case, the trial court now must resolve the evidentiary dispute between the parties, consistent with both the plurality and concurring opinions in *Alameda Books*. In *Center for Fair Public Policy*, there was nothing left for the trial court to do.

Manatee County asks this Court to grant review of the Eleventh Circuit decision now, without waiting for a complete record and a final judgment. In the enactment of Ordinance 99-18, the County *did* have evidence before it, and the Respondents *did* present evidence casting doubt on the County's evidence and rationale. A trial on the merits, resolving the evidentiary dispute, was exactly the result the plurality and concurring opinions in *Alameda Books* intended. There is no conflict between *Center for Fair Public Policy* and this case sufficient to warrant review by this Court until the case below becomes final.

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12. The Petitioners in *Center for Fair Public Policy* had applied to the trial court for a preliminary injunction. Before the issues were briefed, the Defendants placed 14 studies into the record, over the objections of those Petitioners that those studies had never been considered by the Arizona legislature when it enacted the statute. The preliminary injunction was denied, and that denial was affirmed by the Ninth Circuit in a memorandum opinion. *L.J. Concepts v. City of Phoenix*, 215 F.3d 1333 (9th Cir. 2000). After the case was remanded, the parties stipulated that the order denying a preliminary injunction would be treated as the final judgment in the case. No further evidentiary presentation was made. See Appendix D to the Petition for Writ of Certiorari in *Center for Fair Public Policy v. Maricopa County*, Docket Number 03-1107.

3. There is also no conflict among the federal circuits on the evidence needed to support a public nudity ordinance enforced in adult nightclubs that far exceeds ordinances previously found acceptable by this Court.

This Court should compare what actually occurred in the two cases cited by the County as being in conflict with the Eleventh Circuit's opinion and the conflict alleged by the County. In the very first sentence in the portion of the Petition arguing that a conflict exists on the issue of whether summary judgment is appropriate in secondary effects cases, the County says:

> In applying *Alameda Books*, at least two circuits have concluded, contrary to the panel's decision, that evidentiary challenges on the grounds advanced below do not preclude summary judgment in favor of a municipality's secondary effects record.

Petition, at 16.

According to the Petition, there is a conflict between the Eleventh Circuit, holding that summary judgment cannot be used to determine the constitutionality of a secondary effects ordinance, and decisions from the Seventh and Eighth Circuits, holding that summary judgment is still available. This conflict, argues Manatee County, must be resolved by this Court right now. The cases allegedly in conflict with the opinion in this case are *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003) and *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003).

Once again, the County finds conflicts that do not exist. The Petition avoids any mention of significant factual differences between the ordinances involved in the three cases. Those differences should preclude review by this Court on a "conflict" theory.

A. There is no conflict between the decision in this case and the Seventh Circuit's decision in *G.M. Enterprises*.

The County does not point out the significant factual difference between the ordinance considered in *G.M. Enterprises* and Ordinance 99-18, reviewed in this case. In *G.M. Enterprises*, the public nudity ordinance required entertainers in adult cabarets to wear "pasties and G-strings." 350 F.3d at 636. That was the restriction approved by this Court in *Barnes* and in *City of Erie v. Paps A.M.*, 529 U.S. 277 (2000). But that was not the factual situation the Eleventh Circuit found in this case. Ordinance 99-18 requires much more covering than pasties and G-strings.[13] Whether the evidence before the County will be eventually found to be sufficient to justify this expansion of what this Court approved in *Barnes* and *Paps*, or whether the evidence will be insufficient to advance the proposition advanced by the County, must await the trial below. But because of this very material factual difference between *G.M. Enterprises* and this case, there is no conflict necessitating this Court's intervention.

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13. The public nudity ordinance is set out in full in note 2 of the Eleventh Circuit opinion. App. B at 7a-8a.

B. Likewise, there is no conflict between the Eleventh Circuit's opinion and the opinion in *SOB, Inc.* that requires review by this Court.

The other case cited as being in conflict was *SOB, Inc. v. County of Benton*. The first observation Respondents make is that *SOB* does not involve a summary judgment. That case came to the Eighth Circuit following the denial of a permanent injunction after a trial on the merits. SOB had applied for a preliminary injunction, but the trial court consolidated the application with the trial on the merits, under Fed. R. Civ. P. 65(a)(2). That procedure affords both parties a full evidentiary presentation and cross-examination of the evidence presented by the other party. Thus, when the case arrived at the circuit court it had a fully developed record and a final judgment derived from that record.

In this case, the Eleventh Circuit has remanded the case to the trial court after finding that summary judgment was inappropriate to resolve the evidentiary dispute. It did so in proper reliance on the plurality and concurring opinions in *Alameda Books*. Respondents do not understand how Manatee County can claim that the Eighth Circuit held that summary judgment was an appropriate resolution for an evidentiary dispute.

As the County said in its Petition, the Eighth Circuit did decide in *SOB* that "Sugar Daddy's failed to cast sufficient doubt on the County's rationale for the ordinance. . . ." Whether that was a correct or incorrect decision, it did not involve a trial court judgment without benefit of a trial.

The County also does not point out the significant factual difference between the ordinance considered in *SOB* and

Ordinance 99-18, reviewed in this case. In *SOB*, just as in *G.M. Enterprises*, "The Ordinance compelled Sugar Daddy's female dancers to cover their breasts and genitals with pasties and G-strings while performing." 317 F.3d at 859. But as with the alleged conflict with *G.M. Enterprises*, that was not the factual situation in this case. There cannot be an irreconcilable conflict when the facts are so different.

CONCLUSION

Summary judgment is only appropriate when the evidence before the trial court demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The trial court failed to apply this "black-letter" principle when it ended the procedure below short of trial and granted the County's motion for summary judgment.

This case is not final. The parties are going back to the District Court to determine if Manatee County's rationale was sound and its evidence sufficient. There is no need for this Court to halt that process until it is completed. No conflict in decisions of significant magnitude exists. The Writ should be denied.

Respectfully submitted,

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